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In the Supreme Court of the United States

October Term, 1972

No. .....

KEMP O. HIATT,
Petitioner,

vs.

STANADYNE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner, Kemp O. Hiatt, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on October 26, 1972.

CITATIONS TO OPINIONS BELOW

Neither the United States District Court, in granting petitioner's motion to dismiss, nor the Sixth Circuit Court of Appeals, in reversing the judgment of the District Court and remanding the cause for further proceedings, delivered an opinion in connection with their respective decisions. The memorandum order of the District Court is printed in the separately bound Appendix hereto at App. 8, and the memorandum order of the Sixth Circuit at App. 10.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 26, 1972 (App. 10). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Sixth Circuit has erroneously construed and applied the due process requirements of the Fourteenth Amendment of United States Constitution so as to permit in personam jurisdiction to be asserted over a non-resident who neither acts nor causes a consequence in the forum state, and where the cause of action arises solely from plaintiff's unilateral activity within the forum state.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is The Fourteenth Amendment of The United States Constitution, Section 1, as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes involved are Rule 4.3(A)(1) of the Ohio Rules of Civil Procedure and Rules 4(d)(7) and 4(e) of the Federal Rules of Civil Procedure, as follows:

OHIO RULES OF CIVIL PROCEDURE, RULE 4.3(A)(1)

(A) *When service permitted.* Service of process may be made outside of this state, as provided herein, in any action in this state, upon a person who at the time of service of process is a nonresident of this state or is a resident of this state who is absent from this state. The term "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim which is the subject of the complaint arose, from the person's:

(1) Transacting any business in this state;

FEDERAL RULES OF CIVIL PROCEDURES
RULES 4(d)(7) AND 4(e)

(d) *Summons: Personal Service.* The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

* * * * *

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(e) *Same: Service Upon Party Not Inhabitant of or Found Within State.* Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

STATEMENT OF THE CASE

The petitioner is an individual who is a resident of Seattle, Washington. By a written agreement dated May 14, 1945, petitioner, who was then operating a machine shop business in Seattle, Washington, entered into an exclusive license arrangement with one of his employees, Alfred M. Moen, relative to the manufacture and sale of a certain single handle mixing faucet that had been recently invented by Moen. Thereafter, in 1947, petitioner incorporated his machine shop business in the State of Washington under the name of Ravenna Metal Products Corporation ("Ravenna"), and by an agreement dated July

5, 1947, petitioner granted to Ravenna an exclusive sub-license under this 1945 agreement.

In 1956, because of certain business exigencies, Ravenna engaged in negotiations with respondent Stanadyne, Inc., and other interested companies, relative to the possible acquisition of Ravenna. The negotiations with Stanadyne occurred almost exclusively in the State of Washington, and resulted in Stanadyne acquiring all of the issued and outstanding stock of Ravenna, including the 68.6 percent of Ravenna stock which was then owned by petitioner. As a direct result of this acquisition, Stanadyne thereupon became the owner of all of Ravenna's assets, including the exclusive sub-license covering the Moen mixing faucets. During the negotiations leading up to Stanadyne's acquisition of the stock of Ravenna, the proposed site of manufacture was in no way a condition precedent to the completion of the acquisition of Ravenna.

Subsequent to its acquisition of Ravenna, Stanadyne caused Ravenna to be liquidated, and then transferred to itself all of Ravenna's assets, including the subject sub-license agreement, and began manufacturing the single handle mixing faucet at its plant in Elyria, Ohio. Petitioner played no role in the decision in this regard, although Stanadyne's intentions were likely disclosed to petitioner prior to the ultimate acquisition of Ravenna's stock. Further, the faucets that are manufactured in Elyria are marketed by Stanadyne throughout the United States.

Thereafter, Stanadyne initiated discussions with both petitioner and Alfred M. Moen that culminated in the execution in 1957 of a new license agreement (1957 agreement). This particular agreement was executed at the specific request of Stanadyne for the avowed purpose of consolidating into one agreement the various outstanding licenses existing from Moen to petitioner, and petitioner

to Ravenna, all of which had been negotiated, executed and carried out solely in the State of Washington. The 1957 agreement was considered essential by Stanadyne so that it could deal with any future potential patent litigation without the complications that would otherwise result from having more than one exclusive license agreement outstanding, and for other purposes related to such potential patent litigation, such as elimination of four other parties who had previously acquired percentage interests in the Moen royalties. The 1957 agreement was negotiated only in Chicago, Illinois and Seattle, Washington, was prepared by Chicago, Illinois patent counsel for Stanadyne, and was executed by petitioner in Seattle, Washington.

Petitioner remained in Seattle, Washington in the employ of Stanadyne for approximately two years after it had acquired Ravenna, and then resigned from his employment in 1958. During the period of his employment, petitioner never entered the State of Ohio in connection with any phase of the 1957 agreement, nor has he since that time. Both the quarterly royalty payments as well as any quarterly reports called for in the 1957 agreement have been sent to petitioner in Seattle, and the royalty checks have been endorsed there by him. Petitioner has neither retained nor sought control over the situs of the manufacture of the licensed product, and Stanadyne is unrestricted in its determination as to whether it should continue to manufacture the faucets in Ohio, add additional manufacturing plants elsewhere, or move the location of manufacture in its entirety to suit its particular business needs.

From the time the 1957 agreement was executed, and for 14 years thereafter, respondent mailed quarterly royalty checks, covering all single handle mixing faucets manufactured by it, to petitioner in Seattle without ever ques-

tioning its obligation in this regard. Also, the 1957 agreement was amended in certain minor particulars on August 11, 1961 and again on December 31, 1970. Both of these amendments were discussed between the parties in Seattle, Washington and executed by petitioner there. On neither of these occasions did Stanadyne even suggest the possibility of a misapplication of the terms of the 1957 agreement.

However, on June 22, 1971, Paul Mongerson, Executive Vice President of Stanadyne, came to Seattle and for the first time advised petitioner that Stanadyne felt it had been mistaken over the past 14 years in making certain royalty payments to petitioner, and that Stanadyne now believed certain types of single handle mixing faucets it was manufacturing in its Elyria, Ohio plant were not covered by the 1957 agreement, but had been mistakenly included in Stanadyne's royalty calculations over the prior 14 years. Petitioner, of course, disagreed with this conclusion, but it is clear no prior statement or conduct on his part had anything to do with the dramatic and unilateral decision of respondent that it was and is under no obligation to make certain royalty payments to petitioner as it had done in the past.

Shortly after petitioner rejected Stanadyne's late blooming claim, Stanadyne initiated a civil action in the United States District Court for the Northern District of Ohio, Eastern Division (the federal judicial district in which Elyria, Ohio is situated), wherein it seeks a declaration of its rights and obligations under the 1957 license agreement, and also prays for restitution by petitioner of approximately one million dollars which is claimed to have been mistakenly paid by Stanadyne under this agreement over the previous 14 years (App. 1). Petitioner was served by certified mail with summons and a copy of the

complaint at his residence in Seattle, Washington. This service was ostensibly accomplished pursuant to Rules 4(d)(7) and 4(e) of the Federal Rules of Civil Procedure, and Rule 4.3(A)(1) of the Ohio Rules of Civil Procedure (which is Ohio's long arm statute) (pp. 3-4, *supra*).

Thereafter, and before answer was due, petitioner filed a Motion to Dismiss and to Quash Service of Process in the District Court on the grounds that the District Court could not obtain in personam jurisdiction over him, and for the additional reason that venue was not properly situated in the Northern District of Ohio. This Motion was fully briefed by both petitioner and respondent, and the parties supported their respective positions by a number of detailed affidavits.

Thereafter, on December 6, 1971, the District Court entered an Order granting the motion of petitioner and dismissing the Complaint for lack of personal jurisdiction (App. 8). Because of its determination that it lacked the requisite jurisdiction over petitioner, the District Court did not reach the question of whether venue was properly laid in the Northern District of Ohio under the provisions of 28 U.S.C. §1391, and thus this question has not yet been the subject of any judicial determination.

Stanadyne filed an appeal from this judgment with the Sixth Circuit, and thereafter, on October 26, 1972, the Court of Appeals reversed the judgment of dismissal and remanded the cause for further proceedings (App. 10).

REASONS FOR GRANTING THE WRIT

By its decision in the case at bar, and by virtue of several of its recent opinions, the Sixth Circuit has so extended the due process limitations of the Fourteenth Amendment in suits against non-residents that serious questions are now raised as to the proper construction and application of the Supreme Court's prior guidelines in this important area of constitutional law. Specifically, petitioner urges that the Sixth Circuit has manifestly erred in several important respects in its analysis of this Court's previous decisions, thereby creating confusing, unworkable and unfair constitutional standards, and making this case worthy of the further attention of the Supreme Court. These errors are as follows:

(1) In attempting to up-date the Supreme Court guidelines for determining in personam jurisdiction over non-residents that were last articulated in 1958, the Sixth Circuit has established criteria that have been demonstrated to be virtually impossible to understand and apply at the trial court level.

(2) The Sixth Circuit has effectively determined that the holding of the Supreme Court in *Hanson v. Denkla*, 357 U.S. 235 that unilateral activity of the resident plaintiff cannot satisfy the requirement of contact with the forum state is no longer a constitutionally viable doctrine when jurisdiction is sought to be obtained over a non-resident defendant.

(3) If the decision of the Sixth Circuit in this case is permitted to stand, it will encourage and foster the wide-spread use of commercial blackmail between parties to business contracts, and will seriously undermine the proper application of this Court's "fair play and substantial justice" doctrine.

I.

With respect to the first area of concern, it is important to note that the decision of the Sixth Circuit in the case at bar was rendered without a written opinion setting forth the specific reasons for the reversal. Rather, the Court of Appeals, in its brief order, referred to several of its own prior opinions which it apparently felt controlled its decision in this case. These decisions are *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F.2d 376 (6th Cir. 1968) (App. 11); *In-Flight Devices Corp. v. Van Dusen Air, Inc., etc.*, 466 F.2d 220 (6th Cir. 1972) (App. 31); and *M & W Contractors, Inc. v. Arch Mineral Corp. and Eads Coal Company*, 466 F.2d 1339 (6th Cir. 1972) (App. 62).

A review of these opinions from the Sixth Circuit, as well as several others rendered by this same court in recent years,[1] makes it apparent that the Sixth Circuit, more than any other Federal Judicial Circuit, has felt compelled to review and analyze in depth the guidelines for determining in personam jurisdiction over non-residents that were first established by the Supreme Court in the widely cited cases of *International Shoe Co. v. State of Washington*, 326 U.S. 310; *McGee v. International Life Insurance Co.*, 355 U.S. 220; and *Hanson v. Denkla*, 357 U.S. 235, *reh. den.* 358 U.S. 858. It is further evident from these same decisions of the Sixth Circuit that its comprehension and application of the Supreme Court guidelines has not been readily shared or understood by many of the district courts within this Circuit who have been confronted with the threshold constitutional questions that predictably are raised when an attempt is made to bring

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1. See for instance, *King v. Hailey Chevrolet Co., et al.*, 462 F.2d 63 (6th Cir. 1972); *Velandra v. Regie Nationale Des Usines Renault*, 336 F.2d 292 (6th Cir. 1964).

suit against a non-resident defendant within the geographical boundaries of a particular court. Thus, in each of the Sixth Circuit decisions cited in its order, as well as in the instant case, the Sixth Circuit felt compelled to reverse the decision of the district court that had granted the motion to dismiss of the non-resident defendant.[2] Further, these reversals occurred notwithstanding that in *Southern Machine Co. v. Mohasco Industries, Inc.*, the Sixth Circuit went to great lengths to provide its district courts with a detailed and workable set of constitutional guidelines for future application.

The difficulties that the Sixth Circuit in particular, and federal appellate courts in general, have encountered in attempting to fashion an accessible path through this constitutional thicket are not surprising, since of necessity they are attempting to apply standards established by the Supreme Court in the 1940's and 1950's to both service of process statutes and factual issues that were only remotely before the Supreme Court at that point in time. Consider, for instance, that at present virtually every commercial and industrial state in the country has passed a long-arm statute of some type, whereas in the 1950's only non-resident motorist statutes had made their appearances on the jurisdictional scene. Also, the widespread adoption of the Uniform Commercial Code, with its contracts and warranties implied in law, has added greatly to the jurisdictional issues that now, more than ever, confront the courts. Yet despite this marked increase in both the quantity and complexity of jurisdictional due process questions, no lower court, federal

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2. See *Southern Machine Co. v. Mohasco Industries, Inc.*, 263 F. Supp. 164 (E.D. Tenn. 1967); *M & W Contractors, Inc. v. Arch Mineral Corp. and Eads Coal Company*, 335 F. Supp. 972 (S.D. Ohio 1971). The decision of the District Court in *In-Flight Devices Corp. v. Van Dusen Air, Inc.* does not appear to have been reported.

or state, has received the benefit of the Supreme Court's guidance in this most vexatious area of constitutional law since the 1958 decision of this Court in *Hanson v. Denkla*, 357 U.S. 235. Therefore, it is the *Hanson* decision, along with the decisions in *McGee v. International Life Insurance Co.*, 355 U.S. 220, and *International Shoe Co. v. State of Washington*, 326 U.S. 310, that still remain the universal backdrop for jurisdictional due process against which is measured every subsequent case in any other court in which this issue is raised.

Recognizing that the Supreme Court did not intend to establish mechanical tests for the determination of in personam jurisdiction over non-resident defendants, yet obviously somewhat perplexed in its effort to apply the lessons found in the Supreme Court decisions to the facts before it, the Sixth Circuit in *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F.2d 376, dissected the rationale of these Supreme Court decisions for the avowed purpose of establishing up-dated guidelines for use by district courts within its Circuit. The Sixth Circuit construed these decisions as establishing three criteria for determining when a non-resident defendant has subjected himself to in personam jurisdiction. These criteria are as follows:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. 401 F.2d 376 at 381.

As scholarly as the Sixth Circuit may have been in attempting to restructure the Supreme Court decisions to fit them to the jurisdictional issues that currently confront lower courts, and as deliberate as the Court may have been in developing criteria that are susceptible of being understood and applied on a case by case basis on the district court level, the results of its efforts apparently have led to less, rather than more, uniformity in those decisions directly involved with threshold jurisdictional issues. In fact, as noted previously, apparently only the Sixth Circuit itself fully comprehends the rationale of its jurisdictional tests since virtually every district court decision that has been decided subsequent to the opinion *Southern Machine Co. v. Mohasco Industries*, wherein the trial court has dismissed the action for lack of personal jurisdiction over a nonresident, has been reversed on appeal by the Sixth Circuit and jurisdiction sustained.

There emerges from this confusion several fundamental questions that beg for an immediate response by the Supreme Court. Initially, it should be recognized that the Sixth Circuit admittedly was attempting to translate into modern legal parlance an overriding due process doctrine of the Supreme Court that has not been refurbished in at least 15 years. Under these circumstances, it is fair to inquire whether the Sixth Circuit has in fact properly recognized and applied the due process limitations that were last defined by the Supreme Court in *Hanson v. Denkla*. Further, if the Sixth Circuit's innovative approach to this question is basically sound, then the due process considerations should be restated by this Court in such a fashion so as to make them more workable and less confusing at the trial court level. Finally, assuming that this Court is satisfied the three criteria adopted by the Sixth Circuit adequately restate the Supreme Court guidelines, it seems apparent

that the Sixth Circuit failed to follow its own lead when it determined that petitioner met each of the criteria against which jurisdictional due process is to be measured.

II.

Of particular concern to petitioner in his own case is the apparent failure of the Sixth Circuit to heed the admonition of this Court that "unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State". *Hanson v. Denkla,* 357 U.S. 235 at 253. Thus, each of the operative facts that might be construed as giving rise to Stanadyne's suit for declaratory judgment and money damages are a direct result of its own unilateral actions. It was Stanadyne alone that determined to manufacture the subject faucets in Ohio, and then paid the royalties to petitioner in Seattle, Washington without question for 14 years, and finally determined that it had made a mistake in making certain royalty payments over this entire period.

Therefore, by its action in sustaining jurisdiction in this case, and as a result of its opinion in *In-Flight Devices Corp. v. Van Dusen Air, Inc., etc.,* 466 F.2d 220 (App. 31), it is evident that the Sixth Circuit has chosen to ignore the very clear teaching of this Court in *Hanson v. Denkla,* and instead has sought to add a new dimension to the due process considerations of the Fourteenth Amendment; namely, that if a non-resident defendant enters into a contract that he reasonably should anticipate will have a multistate economic impact, he is subject to in personam jurisdiction in *any* of these states without regard to whether he played a role in the manufacturing or marketing decisions that created this economic impact. Should Stanadyne determine to abandon its Elyria, Ohio plant as the situs for the manufacture of the licensed product, and

thereafter start up production in Maine or Florida or Louisiana, or anywhere else in the country, the Sixth Circuit's application of the jurisdictional due process tests of this Court would undoubtedly permit jurisdiction to vest over Hiatt in any such foreign state. Petitioner believes such an application is an erroneous and unwarranted deviation from settled constitutional law, and requires this Court's immediate attention.

III.

If the Sixth Circuit's construction of the constitutional guidelines is given widespread credence by other trial and appellate courts, the jurisdictional abuses that inevitably will be spawned are appalling. A party to a commercial contract who determines, as Stanadyne has done in this case, that it wants to renegotiate an old contract for a more favorable one, can utilize the simple expedient of initiating a declaratory judgment action seeking reformation, modification or even rescission of the original contract in a state far removed from the residence of the innocent party, and immediately gain a significant tactical and economic bargaining advantage. If, like petitioner in the case, the defendant is an individual, the sheer economic burden of defending such a declaratory judgment action brought by a large, publicly-held corporation becomes even more pronounced and inequitable, and in any given situation becomes nothing more than an insidious, but legally protected, form of commercial blackmail.

In the subject case, Stanadyne effectively is saying to petitioner: "Forget the fact that we have been in perfect accord over these past 14 years regarding the meaning and intent of our contract. We now want to modify it substantially, and if you don't agree with us, we're going to file suit against you 2500 miles from your home, and not

only are we going to try to avoid paying you any more royalties in the future, but we're also going to try to make you return the royalties we willingly paid you in the past. If you decide not to give up voluntarily substantial benefits that both of us have agreed since the inception of our contract are rightfully yours, you will be forced to incur many thousands of dollars in additional legal fees, since not only will you have to retain your Seattle attorneys who represented you when the contract was negotiated, but you will also have to retain Cleveland, Ohio counsel, who will have to become as knowledgeable about this license agreement, and its background, as your original counsel. Also, you will be faced with the considerable additional expense of the trips to Cleveland that you and your Washington witnesses and attorneys will have to make in order to prepare and litigate this case properly. And don't ever forget that this suit is an 'everything to gain and nothing to lose' proposition for us, since even if you prevail, we're no worse off than we were when we started the suit. Think about all of this Mr. Hiatt, and then let us know whether you really can afford not to re-negotiate the contract along the lines we suggested".

Has this Court's compelling doctrine of "fair play and substantial justice" become so obscured or eroded by the passage of time that a suit such as this can continue in the face of petitioner's serious jurisdictional challenge? If so, is it not time for the Supreme Court to renew and rejuvenate the Fourteenth Amendment due process considerations that are to guide lower courts in their deliberations?

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1972

No. _____

KEMP O. HIATT,
Petitioner,

vs.

STANADYNE, INC.,
Respondent.

APPENDIX

To Petition for Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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COMPLAINT OF STANADYNE FILED IN UNITED STATES DISTRICT COURT

(Filed June 25, 1971)

Civil Action No. C71-649

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

STANADYNE, INC.,
Plaintiff,

v.

KEMP O. HIATT,

and

ALFRED M. MOEN,
Defendants.

COUNT ONE

1. Plaintiff, Stanadyne, Inc. ("Stanadyne"), is a corporation incorporated under the laws of the State of Delaware and has its principal place of business in the State of Connecticut. Stanadyne is licensed to do business in the State of Ohio, and is doing business in the Northern District of Ohio, wherein this cause of action arose.

2. Defendant, Kemp O. Hiatt ("Hiatt"), is a citizen and resident of the State of Washington. Defendant, Alfred M. Moen ("Moen"), is a citizen and resident of the State of Ohio.

3. The matter in controversy exceeds, exclusive of interests and costs, the sum of $10,000.

4. This is an action for a declaratory judgment and further necessary or proper relief based thereon, and jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1332 and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

5. On or about June 27, 1957, Moen, Hiatt and the Standard Screw Company ("Standard"), a New Jersey corporation, entered into an Agreement ("1957 Agreement"), whereby Moen granted to Standard an exclusive license to make, have made, use and sell certain of Moen's inventions, identified by reference to specific patents and pending patent applications, subject to the payment of royalties by Standard to Hiatt and Moen, Amendments to the 1957 Agreement were made by the parties thereto on August 11, 1961, and December 31, 1970.

6. On or about January 18, 1962, Moen and Standard entered into an Agreement ("1962 Agreement") whereby Moen granted to Standard an exclusive license under patent applications filed by Standard on Moen inventions, and Standard agreed to pay Moen a royalty on any device or apparatus sold by Standard which came within the scope of any claim or claims of such application or patents issuing thereon, except that Standard was not required to pay royalties on such devices or apparatus if it was already obligated to pay royalties to Moen under the 1957 Agreement. The 1962 Agreement was implemented and amended by the parties thereto on June 18, 1971.

7. Standard Screw Company, a Delaware Corporation, acquired the right, title and interest of Standard Screw Company, a New Jersey corporation, and subsequently changed its name to Stanadyne, Inc., whereby

Stanadyne acquired all right, title and interest in and to Standard's interest in the 1957 Agreement and the 1962 Agreement.

8. Stanadyne, or its predecessor in title, has manufactured and sold the "Core," "Cartridge" and "H-C" type single handle faucets, each of which embodies an invention of Moen and comes within the scope of one or more patents owned by Moen, such manufacture and sale commencing at the following times:

"Core" — 1956;

"Cartridge" — 1959;

"H-C" — 1970.

9. Operating under a mistake of fact, the parties to the 1957 Agreement have performed thereunder believing that said Agreement covered the "Core," "Cartridge" and "H-C" type mixing faucets. As a result of said mistake of fact, Stanadyne has paid to Hiatt through the first quarter of 1971 the following royalty amounts, less expenses:

(a) Core — $ 66,744.00

(b) Cartridge — $958,041.00

(c) H-C — $ 2,053.00

10. Although the "Core" type faucet comes within the scope of the 1957 Agreement, plaintiff avers that the "Cartridge" type faucet does not come within the scope of the 1957 Agreement but to the contrary, is covered by the 1962 Agreement. On June 18, 1971, Stanadyne and Moen entered into an Agreement implementing and amending certain provisions of the 1962 Agreement and settling the matter of royalty payments erroneously made by Stanadyne to Moen with respect to the "Cartridge"

type faucet. However, as a direct result of the aforesaid mistake, Stanadyne, believing that the following royalty amount was due Hiatt on the "Cartridge" type faucet, has paid Hiatt the sum of $958,041.00 (less expenses), which amount Hiatt was not entitled to receive. By reason of the aforesaid mistake in payment, Stanadyne has been damaged in the sum of $958,041.00 (less expenses).

11. On June 22, 1971, Stanadyne advised Hiatt that it had mistakenly paid him royalties on the "Cartridge" type faucet which he was not entitled to under the 1957 Agreement. However, Hiatt rejected Stanadyne's determination that he was not entitled to such royalties, insisted that royalty payments continue on the "Cartridge" type faucet and threatened litigation to compel such payments.

12. Stanadyne seeks a declaration of the rights of the parties to the 1957 Agreement to eliminate the possible accrual of avoidable damages. Being more specific, if Stanadyne discontinues royalty payments pursuant to the 1957 Agreement on the "Cartridge" type faucet and pays royalties on such faucet exclusively to Moen under the 1962 Agreement, as amended, Stanadyne might be subject to suit by Hiatt for nonpayment of royalties.

13. Since Stanadyne intends to discontinue all further royalty payments under the 1957 Agreement which are attributable to the "Cartridge" type faucet, a case of actual controversy exists between Stanadyne and Hiatt which is definite, concrete, real and substantial, and which touches the legal relations of plaintiff and defendants. Furthermore, said case of actual controversy admits of an immediate and definitive determination of the legal rights of the parties, and admits of specific relief through a decree of conclusiveness, as appears at length from the foregoing allegations of the Complaint

COUNT TWO

14. Plaintiff repeats and incorporates by reference each and every averment set forth in paragraphs 1 through 9 inclusive of this Complaint with the same force and effect as though fully restated herein.

15. Although the "Core" type faucet comes within the scope of the 1957 Agreement, plaintiff avers that the "H-C" type faucet does not come within the scope of the 1957 Agreement but to the contrary, is covered by the 1962 Agreement. On June 18, 1971, Stanadyne and Moen entered into an Agreement implementing and amending certain provisions of the 1962 Agreement and settling the matter of royalty payments erroneously made by Stanadyne to Moen with respect to the "H-C" type faucet. However, as a direct result of the aforesaid mistake, Stanadyne, believing that the following royalty amount was due Hiatt on the "H-C" type faucet, has paid Hiatt the sum of $2,053.00 (less expenses), which amount Hiatt was not entitled to receive. By reason of the aforesaid mistake in payment, Stanadyne has been damaged in the sum of $2,053.00 (less expenses).

16. On June 22, 1971, Stanadyne advised Hiatt that it had mistakenly paid him royalties on the "H-C" type faucet which he was not entitled to under the 1957 Agreement. However, Hiatt rejected Stanadyne's determination that he was not entitled to such royalties, insisted that royalty payments continue on the "H-C" type faucet and threatened litigation to compel such payments.

17. Stanadyne seeks a declaration of the rights of the parties to the 1957 Agreement to eliminate the possible accrual of avoidable damages. Being more specific, if Stanadyne discontinues royalty payments pursuant to the 1957 Agreement on the "H-C" type faucet and pays royal-

ties on such faucet exclusively to Moen under the 1962 Agreement, as amended, Stanadyne might be subject to suit by Hiatt for nonpayment of royalties.

18. Since Stanadyne intends to discontinue all further royalty payments under the 1957 Agreement which are attributable to the "H-C" type faucet, a case of actual controversy exists between Stanadyne and Hiatt which is definite, concrete, real and substantial, and which touches the legal relations of plaintiff and defendants. Furthermore, said case of actual controversy admits of an immediate and definitive determination of the legal rights of the parties, and admits of specific relief through a decree of conclusiveness, as appears at length from the foregoing allegations of the complaint.

WHEREFORE, Stanadyne prays as follows:

1. That the Court enter a judgment declaring the rights, liabilities and legal relations of the parties to the 1957 Agreement, and more particularly adjudicating:

(a) That the payment of royalties for the manufacture and sale of the "Core" type faucet be made pursuant to the 1957 Agreement as amended;

(b) That the payment of royalties for the manufacture and sale of the "Cartridge" and "H-C" type faucets be made pursuant to the 1962 Agreement as amended and not the 1957 Agreement as amended; and

(c) That due to a mistake by the parties, Stanadyne has paid Hiatt royalties pursuant to the 1957 Agreement on the "Cartridge" and "H-C" type faucets, which royalties Hiatt was not legally entitled to receive.

2. That the Court order Hiatt to make restitution to Stanadyne in the amount of $960,094.00 (less expenses) together with interest, for royalties mistakenly paid as aforesaid.

3. That Stanadyne be awarded its costs herein, together with such other and further relief as the Court may deem just and proper.

/s/ RICHARD W. POGUE
/s/ BARRY L. SPRINGEL
Attorneys for Stanadyne, Inc.

Of Counsel:
JONES, DAY, COCKLEY & REAVIS

ORDER OF DISTRICT COURT GRANTING MOTION TO DISMISS

(Filed December 6, 1971)

Civil Action No. C71-649.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

STANADYNE, INC.,
Plaintiff,

v.

KEMP O. HIATT,

and

ALFRED M. MOEN,
Defendants.

LAMBROS, *District Judge*

With respect to the motion of the defendant Hiatt to dismiss for lack of personal jurisdiction, the Court finds:

1. That the defendant Hiatt has not purposefully availed himself of acting in the State of Ohio or causing a consequence in the State of Ohio.

2. That the case of *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968) is distinguishable from the facts in the present case.

3. That the defendant Hiatt has not transacted business in the State of Ohio as provided for in Ohio Civil Rule 4.3(A)(1).

Accordingly, the motion to dismiss for lack of personal jurisdiction is granted. The complaint is therefore dismissed as to defendant Hiatt.

IT IS SO ORDERED.

THOMAS D. LAMBROS
United States District Judge

Dated: 12/6/71

ORDER OF SIXTH CIRCUIT REVERSING JUDGMENT OF DISMISSAL AND REMANDING CAUSE FOR FURTHER PROCEEDINGS

(Filed October 26, 1972)

No. 72-1506

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STANADYNE, INC.,
Plaintiff-Appellant,

- VS -

KEMP O. HIATT,
Defendant-Appellee.

ORDER

BEFORE: CELEBREZZE, McCREE, and MILLER, *Circuit Judges.*

The appeal from the order dismissing the complaint for lack of personal jurisdiction having come on to be heard on the record from the United States District Court for the Northern District of Ohio, Eastern Division, and the court having considered the briefs and oral arguments of the parties, upon consideration, it is ORDERED that the judgment be, and it hereby is, reversed and the cause is remanded for further proceedings. *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F.2d 376 (6th Cir. 1968); *In-Flight Devices Corp. v. Van Dusen Air, Inc., Etc.*, No. 71-1948 (6th Cir.) decided August 10, 1972; *M & W Contractors, Inc. v. Arch Mineral Corp. and Eads Coal Co.*

Entered by order of the court

/s/ JAMES A. HIGGINS
Clerk

OPINION OF THE SIXTH CIRCUIT IN THE CASE OF SOUTHERN MACHINE COMPANY v. MOHASCO INDUSTRIES, INC., 401 F.2d 376 (1968)

(September 20, 1968)

No. 17,959

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOUTHERN MACHINE COMPANY, INC.,
Plaintiff-Appellant,

vs.

MOHASCO INDUSTRIES, INC.,
Defendant-Appellee.

Before O'SULLIVAN, CELEBREZZE and COMBS, Circuit Judges.

CELEBREZZE, *Circuit Judge.*

This declaratory judgment action arose out of a licensing agreement between Southern Machine Company, Inc., (hereinafter "Southern Machine") Plaintiff-Appellant, and Mohasco Industries, Inc., (hereinafter "Mohasco") Defendant-Appellee. Southern Machine brought the action in the United States District Court for the Eastern District of Tennessee pursuant to 28 U.S.C. § 2201 joining as parties defendant Mohasco and Louisa Carpet Mills, Inc., (hereinafter "Louisa"). Upon the motion of Mohasco, the District Court quashed service of process and dismissed the action as to it for lack of in personam jurisdiction. Since jurisdiction over Mohasco is indispensable for the full de-

claratory relief sought, Southern Machine has appealed the granting of Mohasco's motion. We reverse.

Service of process was made on Mohasco outside the State of Tennessee through the Secretary of State of Tennessee; but no question is raised concerning the adequacy of the notice or the opportunity to be heard[1] or the compliance with the service provisions of the applicable statute, T.C.A. § 20-236. The questions raised by this appeal relate solely to the power of a Tennessee court[2] to bind Mohasco by a judgment *in personam*: (1) Has the Tennessee legislature extended the jurisdictional reach of its courts to non-resident defendants in the position of Mohasco?[3] (2) Can the jurisdictional reach of Tennessee courts, consistently with due process, be extended to non-residents in the position of Mohasco? The two questions merge into one if the Tennessee legislature has authorized Tennessee courts to reach to the full constitutional limits in pursuit of non-resident defendants.

In 1965 the Tennessee legislature enacted a "long arm" statute, which, among other provisions, purports to give Tennessee courts jurisdiction over non-residents who engage in the transaction of any business in Tennessee as to "any action or claim for relief" arising out of that business

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1. Cf. McDonald v. Mabee, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608 (1917); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

2. The in personam jurisdictional reach of a federal district court that is located in Tennessee is determined by the law of Tennessee in diversity actions; Velandra v. Regie Nationale Des Usines Renault, 336 F.2d 292 (6th Cir. 1964); Smartt v. Coca-Cola Bottling Corp., 318 F.2d 447 (6th Cir. 1963); and a "long arm" statute may be used in a federal question action. United States v. First National City Bank, 379 U.S. 378, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965); Rule 4(e) and (f), Federal Rules of Civil Procedure.

3. A state is not required to exercise the full judicial power that the Constitution will permit. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 448, 72 S.Ct. 413, 96 L.Ed. 485 (1952).

transaction. T.C.A. § 20-235(a).[4] In considering this Act, we can put to one side cases where the activities of a corporation are sufficient to justify the assumption of jurisdiction even for causes of action arising outside the forum state. *Cf. Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952). The Tennessee Long Arm Statute is a "single act" statute by which the State only purports to assume jurisdiction over causes of action arising out of the defendant's activities in the State. Since the old "doing business" statute, T.C.A. § 20-220, contains the same limitation, however, some question has been raised whether the "transaction of any business" provision of the "long arm" statute extended the jurisdiction of Tennessee courts any further than the former Act; no authoritative Tennessee State court has yet interpreted the "long arm" statute. We think it is clear that for causes of action arising out of a non-resident defendant's business activities in the State, the Tennessee legislature intended to extend the jurisdiction of Tennessee courts over a non-resident to the full extent permitted by the Fourteenth Amendment.

First, the federal district courts that have interpreted the statute have unanimously found that the statute comprehends the full jurisdiction allowable under the Fourteenth Amendment. *Hamilton National Bank of Chatta-*

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4. Southern Machine has also urged that in personam jurisdiction could be obtained over Mohasco under the two other provisions of T.C.A. § 20-235:

"(c) The ownership or possession of any interest in property located within the state. * * *

"(e) Entering into a contract for services to be rendered or for materials to be furnished in this state." We do not think that either of these provisions were intended to cover the situation in the instant case.

nooga v. Russell, 261 F.Supp. 145 (E.D.Tenn.1966); *Temco, Inc. v. General Screw Products, Inc.*, 261 F.Supp. 793 (M.D. Tenn.1966); *Tate v. Renault, Inc.*, 278 F.Supp. 457 (E.D. Tenn.1967); But Cf. *Fayette v. Volkswagen of America, Inc.*, 273 F.Supp. 323 (W.D.Tenn.1967).[5] Second, the Tennessee Act is substantially the same as the Illinois Long Arm Statute, Ill.Rev.Stat. c. 110, § 17, which had been interpreted as extending jurisdiction to the constitutional limits long before enactment of the Tennessee statute. See *Nelson v. Miller*, 11 Ill.2d 378, 143 N.E.2d 673 (1957); see also *Consolidated Laboratories, Inc. v. Shandon Scientific Company, Ltd.*, 384 F.2d 797, 800-801 (7th Cir. 1967). Third, as was well noted in *Temco, Inc. v. General Screw Products, Inc.*, 261 F.Supp. 793 (M.D.Tenn. 1966) *supra*, "* * * [a] new statute would not have been needed had not an expanded interpretation been desired." 261 F.Supp. at 797. Finally, the Tennessee legislature specifically provided that the "long arm" statute was remedial legislation and was to be liberally construed. T.C.A. § 20-240.

Having found that the Tennessee courts are authorized to reach as far as the Constitution will permit, our sole problem is determining the limits that the Fourteenth

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5. The views of commentators in the state also should be considered as persuasive. An expansion of the judicial jurisdiction of Tennessee courts was urged at an early date with a recommended statute similar in language to the present "long arm" provisions. Overton, Broadening the Bases of In Personam Jurisdiction in Tennessee, 22 Tenn.L.Rev. 237 (1951). Also recent comments have expressed the view that the purpose of the present statute was to exercise the full constitutional power of the Tennessee courts. Note, Expanded Bases of Jurisdiction—An Examination of Tennessee's New "Long Arm" Statute, 18 Vand.L. Rev. 1484 (1965); Comment, Expanded In Personam Jurisdiction —Due Process and the Tennessee Long Arm Statute, 33 Tenn.L. Rev. 371 (1966).

Amendment[6] places upon a state's extraterritorial exercise of in personam jurisdiction. In approaching that problem, a pedantic quibbling with the wording of the statute is inappropriate. The language is general and was intended to cover any business activity that has a substantial enough contact with the state to satisfy constitutional requirements.

With the issue thus narrowed, we turn to the facts of the instant case. In May, 1962, Mohasco and Southern Machine entered into a license agreement by which Southern Machine was authorized to manufacture and sell various tufting machine attachments on which Mohasco held the patent or licensing rights. The agreement contains the usual patent licensing provisions, disavowing any rep-

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6. It has been suggested that the assumption of jurisdiction over foreign corporations could in some cases violate the Commerce Clause. Erlanger Mills v. Cohoes Fibre Mills, 239 F.2d 502, 507 (4th Cir. 1956); Sobeloff, Jurisdiction of State Courts Over Non-Residents in Our Federal System, 43 Corn.L.Q. 196 (1957); compare Cardozo, The Reach of the Legislature and the Grasp of Jurisdiction, 43 Corn.L.Q. 210, 214 (1957). Certainly, where the cause of action arose elsewhere out of a transaction entered into elsewhere and where the plaintiff did not reside in the forum state nor did the defendant engage in anything more than solicitation in the forum state, assumption of in personam jurisdiction could raise serious Commerce Clause questions. Davis v. Farmers Co-Operative Equity Co., 262 U.S. 312, 43 S.Ct. 556, 67 L.Ed. 996 (1923). But, since the Tennessee Statute requires that the cause of action arise from the business transaction and since the Fourteenth Amendment requires that the transaction have a substantial contact with the state, it is unlikely that application of the Tennessee statute will ever be at odds with the Commerce Clause. If an overly burdensome situation should arise, the constitutional problem could be avoided by use of the doctrine of *forum non conveniens*, both in the federal courts, Gulf Oil Co. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), and in the state courts, Zurick v. Inman, 426 S.W.2d 767 (Tenn.1968). Therefore, we do not consider the Commerce Clause as a serious obstacle to the assumption of jurisdiction in this case. Cf. Buckley v. New York Post Corporation, 373 F.2d 175, 183-184, 20 A.L.R.3d 942 (2d Cir. 1967), where it is suggested that *forum non conveniens* might assume constitutional stature in some situations.

resentation by Mohasco as to the validity and enforceability of the patents and prohibiting Southern Machine from attacking the validity of the patents, and also contains some provisions peculiar to Mohasco's licensing plan. For example, Southern Machine is not required to pay a royalty or fee for attachments made and sold in the United States; but attachments can be sold there only to parties whom Mohasco has licensed to use the attachments.[7] On the other hand, a foreign-use royalty must be paid on attachments sold outside the United States and the Mohasco Foreign Patent Area.[8]

By the terms of the agreement, Southern Machine is required to submit comprehensive quarterly reports to Mohasco. In addition, records must be kept relating to any sale, lease or loan of attachments, and the records are to be open to inspection by Mohasco for the purpose of verifying the accuracy of Southern Machine's reports and foreign-use royalty payments. The agreement also requires Southern Machine to obtain certain covenants from any purchaser, lessee or borrower of an attachment and requires that a specific notification plate be affixed to every attachment that is manufactured by Southern Ma-

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7. Mohasco apparently collects a royalty from the parties licensed to use the patented attachments; for the agreement provides:

> "14. MOHASCO hereby agrees to grant to all third parties designated by the LICENSEE non-exclusive, non-transferable licenses under the LICENSED PATENTS to use in the United States ATTACHMENTS obtained from the LICENSEE, provided, however, that MOHASCO shall have the right to refuse to grant such a license to a third party whose credit rating, based upon sound business judgment, is unacceptable to MOHASCO."

8. The agreement provides: "(e) the term MOHASCO FOREIGN PATENT AREA shall mean Belgium, Canada, France, Great Britain, Italy, and West German." Apparently, Southern Machine is not authorized to sell attachments in these countries. (Par. 3 of Agreement).

chine. The agreement is to remain in force until January 2, 1978, unless sooner terminated.

Affidavits submitted by officers of the two corporations are in conflict concerning the nature of the negotiations leading to the execution of the agreement. But the assertion is uncontested that at the time the agreement was executed Southern Machine, a Tennessee corporation, had only one manufacturing plant, which was located in Chattanooga, Tennessee. Southern Machine says that the negotiations were primarily by long distance telephone between Tennessee and New York, while Mohasco contends that the negotiations occurred at its office in Amsterdam, New York in March, 1962. In any event, the agreement provides that it is to be construed as having been made in New York and in accordance with the law of New York; and both parties acknowledge that the agreement was drawn up by Mohasco, signed by Southern Machine in Chattanooga, and then finally executed by Mohasco in New York.

The record is not very well developed concerning the extent of performance under the contract by either party. What expenses Southern Machine incurred in altering its machinery and production schedules to produce the tufting machine attachments and what expenses it has incurred in marketing the attachments are not indicated in the record. Southern Machine asserts, however, that two Mohasco representatives came to Chattanooga to inspect the plant facilities and to explain how the attachments were to be built; but Mohasco denies that any of its agents have been in Tennessee on any matter relating to the licensing agreement. The record does show, however, that E'Con Carpet Mills, Inc., a Tennessee corporation located in Chattanooga, has been licensed by Mohasco to use an attachment produced by Southern Machine under this licensing agreement and that the Singer Company, Cobble Division, which is

located in Chattanooga, is also manufacturing tufting machine attachments under some arrangement with Mohasco.

Although Mohasco is a New York corporation with its principal offices in Amsterdam, New York, it has divisions located in other states. Nevertheless, Mohasco has no office and neither owns nor leases any property in Tennessee. Nor has Mohasco qualified to do business in Tennessee or appointed the Secretary of State of Tennessee or any other person as agent for the service of process in that State. On the other hand, Mohasco has apparently managed to derive a profit from the commerce of Tennessee. A regional sales representative calls about six times a year on an independent Memphis distributor of Mohawk products. Also three salesmen, one of whom is a resident of Tennessee, solicit orders from retailers in the State; and one of Mohasco's divisions solicits orders by mail in the State. All orders from Tennessee, however, from whatever source, are mailed to the New York office for acceptance or rejection there, and all merchandise that is shipped into Tennessee is shipped from outside the State to the customer, presumably by common carrier.

The present controversy concerns the licensing agreement outlined above and a contract between Louisa Carpet Mills, Inc., a Kentucky corporation, and Southern Machine for the manufacture and delivery of certain machines, including some of the patented attachments. When the contract between Louisa and Southern Machine had been executed, Mohasco, pursuant to its agreement, approved Louisa for a use license. After delivery of one machine and preparation of the rest of the order, however, Louisa refused to take a use license because the patents covered by the license agreement had been held invalid by the United States District Court for the Northern District of Georgia. *Mohasco Industries, Inc. v. E. T. Barwick Mills,*

Inc., 221 F.Supp. 191 (N.D.Ga.1963). Aff'd 340 F.2d 319 reh. denied 342 F.2d 431 (5th Cir. 1965) cert. denied 382 U.S. 847, 86 S.Ct. 61, 15 L.Ed.2d 86 (1965). If Southern Machine would not deliver, Louisa threatened to obtain the machines elsewhere; and it is alleged in the complaint without contradiction that other manufacturers without licenses from Mohasco have been manufacturing and selling the patented attachments "* * * with impunity and without any apparent or effective action on the part of Mohasco to stop or prevent such manufacturing or sales. * * *" Upon being advised of the circumstances, Mohasco, nevertheless, refused to waive the use licensing requirement for Louisa. Southern Machine then brought this action against Mohasco and Louisa to have its rights declared under both the licensing agreement and its contract with Louisa.[9]

The nature and quality of a person's contact with a state that will serve as the basis for the exercise of *in personam* jurisdiction over that person by the state is not a subject of easy description. We have come a long way since the simplistic rule of *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878), that "* * * [p]rocess from * * * one state cannot run into another state * * *." 95 U.S. at 727. Presence of the defendant in the forum state at the time process is served is no longer required. Our courts have moved "away from the bias favoring the defendant toward [a policy] permitting the plaintiff to insist that the defendant come to him" when a sufficient basis exists for such insistence.[10] In early attempts to pay lip service to

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9. Louisa apparently submitted to the jurisdiction of the District Court; so no question can be raised concerning jurisdiction over that corporation.

10. Von Mehren and Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv.L.Rev. 1121, 1128 (1966); see also Hazard, A General Theory of State-Court Jurisdiction, 1965 Sup. Ct.Rev. 241 (1965).

the dogma of *Pennoyer* while still sustaining jurisdiction over non-residents, the court tried to define that sufficient basis by fictionalized approaches, such as "implied consent," "presence," and "doing business."[11] But those approaches failed to "* * * [put] the real question * * *"[12] and in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the United States Supreme Court broke with the past[13] and established a new test:

> "* * * due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316, 66 S.Ct. at 158.

Today, it can no longer be doubted, if it ever was,[14] that the doing of an act or the causing of a consequence in the

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11. The evolution from these approaches to the "minimum contacts" test has been the subject of much comment. E. g. Kurland, The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts, 25 U.Chi.L.Rev. 569, 569-86 (1958) Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois, 1963 U.Ill.L.F. 533 (1963); note, Developments in the Law—State Court Jurisdiction, 73 Harv.L.R. 909, 916-35 (1960).

12. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930) approved International Shoe Co. v. State of Washington, 326 U.S. 310, 316-317, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

13. At one time it might have been argued that *International Shoe* only attempted to reconcile the past cases rather than establish a new test, but later cases have shown that it was indeed the beginning of a new approach. Kurland, supra, Note 11, at 586.

14. See, Hess v. Pawlowski, 274 U.S. 352-353, 47 S.Ct. 632, 71 L.Ed. 1091 (1927); Cf. Wuchter v. Pizzutti, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446 (1928)

forum state by the defendant can satisfy the requirements of the "minimum contacts" test.[15]

But "traditional notions of fair play and substantial justice" is hardly a precise and definitive standard; it gives us no more basis for judging than the highly amorphous and ultimately subjective standard of reasonableness.[16] As we have noted before, application of the test "* * * must * * * be worked out with reference to the facts of a particular case * * *" *Velandra v. Regie Nationale Des Usines Renault*, 336 F.2d 292, 295 (6th Cir. 1964). On the other hand, the test does at least state the real issue; and after twenty-three years of application, it can no longer be considered an unknown quantity. Although the test can never be stated as a dogmatic principle *á la Pennoyer*, a general outline of its present outermost limits can be derived from pertinent Supreme Court opinions, and decisions of the other federal courts will aid in applying the rule thus derived to particular facts.

When considering a single act as the basis of *in personam* jurisdiction, the two most pertinent Supreme Court cases after *International Shoe* are *McGee v. International Life Insurance Company*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 2d 223 (1957), and *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). In *McGee*, the only contacts of a Texas insurance Company with California were

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15. See, McGee v. International Life Insurance Company, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961). See generally, Reese and Galston, Doing an Act or Causing a Consequence as Bases of Judicial Jurisdiction, 44 Iowa L.Rev. 249 (1959).

16. Cf. Restatement (Second), Conflict of Laws §§ 41(1), 47(2), 50 and 52 (Tentative Draft 1967); Reese, Judicial Jurisdiction Over Non-Residents; The Impact of McGee v. International Life Insurance Company, 13 Record of N.Y.C. B.A. 139, 140-141 (1958).

the mailing of a reinsurance certificate and premium notices into the State and the receiving of the signed certificate and premium payments by mail from the State on only one policy insuring a California resident. Upholding the jurisdiction of a California court over the Texas insurance company in a suit by a California beneficiary of the policy, the Supreme Court said: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." 355 U.S. at 223, 78 S.Ct. at 201.

Hanson v. Denckla, supra served notice, however, that an interest in the plaintiff or an interest in the cause of action are not by themselves sufficient to justify a state issuing process beyond its borders. In that case, the Court held that Florida could not assume *in personam* jurisdiction over a Delaware trustee of a trust that was executed in Pennsylvania by a domicile of Pennsylvania who later moved to Florida. Noting the trend toward expanding personal jurisdiction over non-residents, the Court cautioned that to satisfy the requirements of due process "* * * it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." 357 U.S. at 253, 78 S.Ct. at 1240.

From these two cases, three criteria emerge for determining the present outerlimits of *in personam* jurisdiction based on a single act. First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a sub-

stantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.[17]

Applying these criteria to the instant case, we first approach the *sine qua non* for *in personam* jurisdiction: Has Mohasco purposefully availed itself of the privilege of transacting business in Tennessee? In considering this question, we can first dispose of those matters that are immaterial. For example, Mohasco has denied that any of its agents have been physically present in Tennessee concerning any matter related to the licensing agreement. Physical presence of an agent is not necessary, however, for the transaction of business in a state.[18] The soliciting of insurance by mail,[19] the transmission of radio broadcasts into a state,[20] and the sending of magazines and newspapers into a state to be sold there by independent contractors[21] are all accomplished without the physical presence of an

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17. A similar approach to the problem of *in personam* jurisdiction is apparently followed in at least three other Circuits. L. D. Reeder Contractors of Arizona v. Higgins Industries, 265 F.2d 768 (9th Cir. 1959); Aftanase v. Economy Baler Company, 343 F.2d 187 (8th Cir. 1965); Curtis Publishing Company v. Birdsong, 360 F.2d 344, 352-353 (5th Cir. 1966) (Rives, J. concurring). See also, Note, Jurisdiction Over Non-Resident Corporations Based on a Single Act: A New Sole for International Shoe, 47 Georgetown L.J. 342, 351 (1958).

18. Also presence of a corporate agent is not by itself a sufficient basis for jurisdiction; the presence must be for the purpose of conducting business in the state. Kaye-Martin v. Brooks, 267 F.2d 394 (7th Cir. 1959); Blount v. Peerless Chemicals (P.R.), Inc., 316 F.2d 695 (2d Cir. 1963).

19. McGee v. International Life Insurance Company, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); Schutt v. Commercial Traveler's Mutual Accident Ass'n, 229 F.2d 158 (2d Cir. 1956); Parmalee v. Iowa State Traveling Men's Ass'n, 206 F.2d 518 (5th Cir. 1953); Cf. Travelers Health Association v. Virginia, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 (1950).

20. WSAZ, Inc. v. Lyons, 254 F.2d 242 (6th Cir. 1958).

21. Buckley v. New York Post Corporation, 373 F.2d 175 (2d Cir. 1967); Curtis Publishing Company v. Golino, 383 F.2d 586 (5th Cir. 1967).

agent; yet all have been held to constitute the transaction of business in a state.[22] Similarly, the contention that Southern Machine solicited the license agreement from Mohasco is immaterial. *Shealy v. Challenger Manufacturing Company*, 304 F.2d 102 (4th Cir. 1962). Mohasco chose to deal with Southern Machine; and as Judge Sobeloff noted in *Shealy*, it cannot diminish the purposefulness of Mohasco's choice that "* * * [Mohasco,] like the maker of the better mousetrap, is fortunate enough to get the business without active solicitation * * *." 304 F.2d at 104. Likewise, the technicalities of the execution of the contract and the contractual provision that the contract was made in New York and was to be interpreted according to the law of New York cannot change the business realities of the transaction.[23] Cf. *Bach v. Friden Calculating Mach. Co.*, 167 F.2d 679 (6th Cir. 1948); *Abel v. Albina Engine & Machine Works*, 284 F.2d 510, 513 (10th Cir. 1960). Legal principles designed for choice of law purposes or for the purpose of interpreting a contract are not sufficient guides for measuring the power of a state to issue process beyond its borders. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

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22. Although some state statutes might require the physical presence of an agent, the constitutional limits clearly extend further. Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951, 955 (2d Cir. 1967).

23. In Travelers Health Association v. Virginia, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 (1950), the Supreme Court rejected "* * * the contention * * * that a state's power to regulate must be determined by a 'conceptualistic discussion of theories of the place of contracting or of performance.' Instead we accorded 'great weight' to the 'consequences' of the contractual obligations in the state where the insured resided and the 'degree of interest' that state had in seeing that those obligations were faithfully carried out." 339 U.S. at 647-648, 70 S.Ct. at 929-930. Legislative jurisdiction and jurisdiction to adjudicate were involved in that case, but the opinion stated the above principle as applicable to both.

We are applying a constitutional standard defined in the broadest terms of "general fairness" to the defendant. Cf. *Perkins v. Benquet Mining Co.*, 342 U.S. 437, 445, 72 S.Ct. 413, 96 L.Ed. 485 (1952). For the purposes of that standard, business is transacted in a state when obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state; and the defendant has purposefully availed himself of the opportunity of acting there if he should have reasonably foreseen that the transaction would have consequences in that state.[24] There can be little doubt that both of these tests are satisfied in this case.

Mohasco dealt directly with a Tennessee corporation whose only manufacturing plant was located in Chattanooga.[25] The subject of the transaction was a licensing agreement that called for the manufacture of tufting machines at that plant and that contemplated the marketing of the tufting machines in Tennessee as well as other states.[26] Machines manufactured under the agreement

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24. Reasonable foreseeability has been considered an appropriate test for legislative jurisdiction. Compare, Young v. Masci, 289 U.S. 253, 53 S.Ct. 599, 77 L.Ed. 1158 (1933), with Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934). In the context of this case, the same considerations would seem to apply to the exercise of judicial jurisdiction. See also, Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois, 1963 U.Ill.L.F. 533, 549 (1963).

25. A purposeful contact might be more difficult to find when the defendant deals in the state only indirectly through independent subsidiaries. Velandra v. Regie Nationale Des Usines Renault, 336 F.2d 292 (6th Cir. 1964). But the separation of the parent corporation from the commerce of the state must be real and not merely superficial. Moore-McCormack Lines, Inc. v. Bunge Corporation, 307 F.2d 910 (4th Cir. 1962); Massey-Ferguson Limited v. Intermountain Ford Tractor Sales Company, 325 F.2d 713 (10th Cir. 1963).

26. Compare, Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847, 853-854 (5th Cir. 1966); Frazier, III v. Alabama Motor Club, Inc., 349 F.2d 456 (5th Cir. 1965); Japan Gas Lighter Association v. Ronson Corp., 257 F.Supp. 219, 235 (D.N.J.1966)

have in fact been sold or leased in Tennessee to E'Con Carpet Mills, Inc., and Mohasco has presumably obtained royalties from that buyer or lessee. The license agreement's direct impact on the commerce of Tennessee can hardly be denied, and it can also hardly be denied that the parties contemplated such an impact at the time the license agreement was executed.

So it is clear that Mohasco has purposely availed itself of the privilege of transacting business in Tennessee; therefore, we can proceed to the second inquiry: Does the cause of action arise from the business transacted in the State? This question can be disposed of shortly. Although Mohasco argues that this controversy arises from Louisa's refusal to perform under its contract with Southern Machine, that argument misses the gist of the declaratory relief sought and ignores the business realities of the licensing agreement. Southern Machine was licensed by Mohasco to manufacture attachments, the manufacturing of which was allegedly protected by Mohasco's exclusive power to license. When it entered into the agreement, Southern Machine probably could reasonably assume that Mohasco would place restrictions on other manufacturers similar to those placed on Southern Machine and, thus, that it would be able to effectively compete in the sale of the attachments. Presumably, Southern Machine went to some expense in producing the marketing the attachments. Since the patents covering the attachments have been held invalid in one Circuit, Southern Machine's continuing rights and obligations under the license agreement have a questionable status. Cf. *Drackett Chemical Co. v. Chamberlain Co.*, 63 F.2d 853 (6th Cir. 1932).

In any case, events subsequent to the execution of the license agreement have placed Southern Machine in a dilemma that is graphically presented in the instant con-

troversy. Louisa has refused to pay Mohasco a royalty to use attachments that the Fifth Circuit has said are part of the public domain. Since Southern Machine cannot sell attachments to anyone who is not licensed by Mohasco, it is now presented with a Hobson's choice: it can complete the sale to Louisa, risking a suit by Mohasco for breach of the license agreement, or it cannot refuse to complete the sale and sue Louisa for breach of contract, risking the possibility that Louisa is right in its refusal to take a use license. Instead of foundering on the horns of this dilemma and instead of choosing to repudiate the license agreement, thus risking a suit for patent infringement, Southern Machine has elected to finally resolve the present conflict and to make its future course under the license agreement clear by means of this declaratory judgment action.[27]

The above analysis[28] shows that many of the operative facts of this controversy arose from obligations created by the license agreement and from acts performed under that agreement.[29] Mohasco's participation in establishing those obligations and in setting in motion that performance

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27. It is suggested that the nature of the cause of action is an important consideration. If that suggestion implies that declaratory judgment actions are inferior to actions for damages, it misses the mark. The only requirement is that the cause of action, of whatever type, have a substantial connection with the defendant's in-state activities. The appropriateness of the declaratory judgment remedy in this case is apparent. If the controversy is not resolved now, this dilemma will confront Southern Machine repeatedly throughout the lifetime of the license agreement.

28. The analysis accepts the complaint as well pleaded and expresses no view as to this Court's opinion concerning the correctness of the facts set out.

29. Only when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that contract. See, Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317 (2d Cir. 1964); Scheidt v. Young, 389 F.2d 58 (3d Cir. 1968); Dragor Shipping Corporation v. Union Tank Car Company, 361 F.2d 43 (9th Cir. 1966); Kourkene v. American BBR, Inc., 313 F.2d 789 (9th Cir. 1963).

is clear. Compare, *Japan Gas Lighter Association v. Ronson Corp.*, 257 F.Supp. 219, 234-235 (D.N.J. 1966). To suggest that Mohasco should not be joined in this action because it has been guilty of no breach of contract or bad faith conduct places the emphasis on the wrong consideration. *In personam* jurisdiction is not assumed as punishment for the commission of a tort or the breach of a contract. Its assumption is not based on the fault of the defendant but on the interest of the state. A state has as much interest in resolving business differences before they cause damage as it has in providing a remedy once the damage has occurred.

Since it is clear that this cause of action arises from the licensing agreement, we must confront the final question: Does the licensing agreement have a substantial enough connection with Tennessee to make it reasonable to compel Mohasco to come to Tennessee to defend this suit? We think it does.

Ultimately, our decision must depend upon a determination of whether Tennessee has an interest in resolving the conflict at issue; but, once the first two questions have been answered affirmatively, resolution of the third involves merely ferreting out the unusual cases where that interest cannot be found.[30] In this case, we are aided somewhat in that determination by the Tennessee legislators, who have declared that State's interest in any cause of action arising from any business transaction in Tennes-

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30. For example, if Louisa attempted to sue Mohasco in Tennessee for damages occurring in Kentucky as a result of some defect in the patent design of an attachment bought from Southern Machine, it could be admitted that Mohasco was engaged in business in Tennessee and that the cause of action arose from that business without conceding jurisdiction. For Tennessee would have no interest in resolving that controversy. Compare, Blount v. Peerless Chemicals (P.R.), Inc., 316 F.2d 695, 700 (2d Cir. 1963).

see.[31] As Judge Friendly noted in *Buckley v. New York Post Corporation*, 373 F.2d 175 (2d Cir. 1967):

> "Once we free our minds from traditional thinking that the plaintiff must inevitably seek out the defendant, such a doctrine would not seem to violate basic notions of fairplay; any view that it does must rest on an inarticulate premise, which a legislature is free to question, that plaintiffs are much more given to making unjust claims than defendants are to not paying just ones." 373 F.2d at 181.

We should be careful not to subvert the expressed interest of Tennessee by a too grudging interpretation of the long arm statute or a too restrictive view of the requirements of due process.[32]

That interest of the State cannot be measured by "a little more or a little less," *International Shoe Co. v. State*

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31. Cases of isolated torts by corporate agents in states having no other relevant contact with the defendant corporation seem to have never given the courts any difficulty. Dealer's Transport Co. v. Reese, 138 F.2d 638 (5th Cir. 1943) (non-resident motorists act applied to foreign corporation); Elkhart Engineering Corporation v. Dornier Werke, 343 F.2d 861 (5th Cir. 1965). It is difficult to see why isolated business transactions should stand on a different footing. A difference of constitutional proportions between a state's interest in securing reasonable business expectations and a state's interest in remedying torts is not easily discernible. See Note, 73 Harv.L.Rev. 909, 926 (1960) supra Note 11.

32. In Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), the Court noted that one important distinguishing feature of McGee was that California "* * * had enacted special legislation * * * to exercise * * * its 'manifest interest' in providing effective redress for citizens * * *." 357 U.S. at 252, 78 S.Ct. at 1239. This same deference for a state legislature's determination of a state's interest was indicated by an in chambers decision of Mr. Justice Goldberg in a case concerning the New York Long Arm Statute. Rosenblatt v. American Cyanamid Company, 86 S.Ct. 1, 3-4, 15 L.Ed.2d 39 (1965). Cf. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 627-628, 55 S.Ct. 553, 79 L.Ed. 1097 (1935).

of Washington, 326 U.S. 310, 319, 66 S.Ct. 154, 159, 90 L.Ed. 95 (1945); it is not diminished simply because only one contract is relied upon as the basis of jurisdiction.[33] *Gkiafio v. Steamship Yiosanos*, 342 F.2d 546 (4th Cir. 1965); *Kokomo Opalescent Glass Co. v. Arthur W. Schmid Inter., Inc.*, 371 F.2d 208 (7th Cir. 1966); *Swanson Painting Company v. Painters Local Union No. 260*, 391 F.2d 523 (9th Cir. 1968); *Houston Fearless Corp. v. Teter*, 318 F.2d 822 (10th Cir. 1963); *Hull v. Gamblin*, 390 F.2d 462 (D.C. Cir. 1968). And when the contract is with a resident of Tennessee, the State's interest in resolving a suit based on the contract and brought by that resident cannot be doubted. See, *Washington v. Hospital Service Plan of New Jersey*, 120 U.S.D.C.App. 211, 345 F.2d 105, 108 (1965); *Buckley v. New York Post Corporation*, 373 F.2d 175, 181 (2d Cir. 1967); Cf. *McGee v. International Life Insurance Company*, 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). Besides this contract is not a one-shot affair. Mohasco has retained substantial control over the manufacture and marketing of the attachments, and it is of no legal significance whether Mohasco has in fact exercised those powers. *Atwood Hatcheries v. Heisdorf & Nelson Farms*, 357 F.2d 847, 850 n. 7 (5th Cir. 1966). The agreement contemplates a long continuing relationship between Mohasco and South-

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33. The record in this case is not well developed concerning Mohasco's other contacts with Tennessee. The extent of its sales, the contacts of its salesmen and divisions, and its other patent licensing activities might be sufficient enough to make Mohasco amenable to suit even for claims not related to the "'mainstream' of its commercial intercourse within the state." Sanders Associates, Inc. v. Galion Iron Works & Mfg. Co., 304 F.2d 915, 923 (1st Cir. 1962). If the license agreement with Southern Machine was an insufficient basis for jurisdiction, it would be appropriate to remand the case for further findings. Agrashell, Inc. v. Bernard Sirotto Company, 344 F.2d 583 (2d Cir. 1965); Lone Star Motor Import, Inc. v. Citroen Cars Corp., 288 F.2d 69 (5th Cir. 1961). Since we find that agreement sufficient, we need not consider the other issue and only mention it in passing.

ern Machine. Mohasco apparently thought that it could profit from such an arrangement, and it has in fact received a return from the agreement. Compare *Atwood Hatcheries v. Heisdorf & Nelson Farms, supra* at 853-854; and *Japan Gas Lighter Association v. Ronson Corp.*, 257 F.Supp. 219, 234-236 (D.N.J. 1966). Tennessee has a continuing interest in this continuing relationship, and apparently Mohasco has a continuing interest in profiting from the Tennessee market.[34] It cannot complain if along with the profits from the Tennessee market it must also accept the process from the Tennessee courts.[35]

Throughout the opinion, this Court has taken the uncontested facts in the complaint and affidavits as true and from those facts has drawn reasonable inferences pertinent to the issues of *in personam* jurisdiction. In so doing, this Court expresses no view as to the probable outcome of the suit in a trial on the merits. The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

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34. Due process requires only that a defendant not be "compelled to defend himself in a court of a state with which he has no relevant connection." Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois, 1963 U.Ill.L.F. 533, 534 (1963).

35. From the record before us, it appears that a balancing of the inconveniences to the parties might also go against Mohasco, but that consideration is more pertinent in determining whether the Eastern District of Tennessee is an appropriate forum than in determining whether it is a permissible forum. Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 121 (2d Cir. 1967); see 28 U.S.C. § 1404(a). That issue is not raised or considered here.

OPINION OF SIXTH CIRCUIT IN THE CASE OF IN-FLIGHT DEVICES CORP. v. VAN DUSEN AIR, INC., 466 F.2d 220 (1972)

(August 10, 1972)

No. 71-1948

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN-FLIGHT DEVICES CORPORATION,
Plaintiff-Appellant,

VS.

VAN DUSEN AIR, INCORPORATED, etc.,
Defendant-Appellee

Before PHILLIPS, *Chief Judge,* CELEBREZZE, *Circuit Judge* and MCALLISTER, *Senior Circuit Judge.*

CELEBREZZE, *Circuit Judge.*

In March 1971, In-Flight Devices, Inc. brought suit against Van Dusen Air, Inc. in the United States District Court for the Southern District of Ohio. In-Flight's complaint set forth claims of breach of contract and damage to business reputation assertedly resulting from Defendant's conduct.

In-Flight is incorporated under the laws of, and has its principal place of business in, Ohio. Van Dusen is incorporated under the laws of Minnesota and has its principal place of business within that State. Jurisdiction over the subject matter of the action properly was predicated upon

diversity of citizenship, 28 U.S.C. § 1332. Service of process upon Defendant was made by certified mail sent to, and received, at Defendant's Minneapolis headquarters.

In the District Court Van Dusen moved to dismiss the action on the ground that the Court lacked personal jurisdiction over it. After considering affidavits and briefs filed by the parties, the District Court granted Defendant's motion and dismissed the case. This appeal followed.

The factual pattern giving rise to the present jurisdictional dispute is not a complicated one, although unresolved questions of fact do exist.

In-Flight Devices is a manufacturer of airplane parts. Its offices and plant are located in Columbus, Ohio. Van Dusen Air, Inc. is a distributor of airplane parts with headquarters in Minneapolis, Minn. and a purchasing operation centralized in St. Louis, Mo. Through a network of wholly owned subsidiaries Van Dusen sells airplane parts throughout the country. Van Dusen, is not licensed to do business in Ohio, nor does it have a resident agent within that State. It does, however, control a wholly owned subsidiary known as Van Dusen Aircrafts Supplies, Ohio Div., Inc. [hereinafter referred to as "the Ohio subsidiary"] which is a corporation organized under the laws of the State of Ohio and having as its principal place of business, Vandalia, Ohio. The Ohio subsidiary is one of the links in the Van Dusen Distribution chain, purchasing parts from the parent corporation and reselling the parts to retail dealers.

In May, 1970 Van Dusen and In-Flight began negotiations directed toward Van Dusen's purchase of 1000 aircraft "transponders" at a total purchase price in excess of $200,000.00. On May 6th of that year the president and several other officers of In-Flight flew to Minneapolis where they discussed the proposed deal with Van Dusen

Air's president. Later that same day the In-Flight officers flew to St. Louis, Mo. where they had further discussions with Van Dusen's Vice-President in charge of purchasing, Paul J. Bingaman. At the conclusion of these talks, Bingaman gave the In-Flight officers a hand drawn purchase order for the transponders.

Still later on that same day, however, the In-Flight officers were asked to meet with F. J. Modz, Regional Manager of Van Dusen Aircraft Supplies, Midwestern Division (another Van Dusen subsidiary with a main office in Chicago, Ill.). The meeting with Modz took place in Vandalia, Ohio—a city in which Van Dusen's Ohio subsidiary had its offices.

There is considerable dispute between the parties as to precisely what occurred at this Vandalia meeting.[1] Plaintiff-Appellant maintains that Frank Modz was a member of the "Central Purchasing Committee" of Van Dusen and that Modz' approval of the contract terms was a prerequisite to the final acceptance of those terms by Van Dusen. It is asserted that Modz, in fact, did not agree to the terms as presented and secured a further 10% discount for his Company at the meeting held on the evening of the 6th.

Defendants-Appellees deny Modz had any power to approve or disapprove the contract terms worked out in

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1. Under appropriate circumstances it might prove essential to resolve the conflict between affidavits by a hearing on the factual questions presented. Such resolution could come at a pre-trial hearing authorized by Rule 12(d) Federal Rules of Civil Procedure, or if the issues are intimately connected with substantive questions involved in the case such resolution could be deferred until the trial in chief. See 2A Moore's Federal Practice § 12.16, 2352-2357; cf. O'Hara International Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971); United States v. Montreal Trust Co., 358 F.2d 239, 242 n. 4 (2d Cir. 1966). Though for diametrically opposed reasons we, like the District Court, believe resolution of the factual conflict relevant to jurisdiction is unnecessary here. See note 24, infra

St. Louis. They acknowledged that Modz discussed the 10% cash discount with the In-Flight representatives, but assert that Modz was simply discussing "his understanding of [Van Dusen] policy which was to attempt to obtain an additional 10% discount on subsequent orders of new lines of equipment. . . ." Van Dusen asserts that the 10% discount which did appear in the final typed purchase order issued in July was agreed to in Minneapolis before the Modz meeting although it was not written into the handwritten purchase order which emerged from the St. Louis and Minneapolis sessions.

While considerable uncertainty exists on the question of whether or not the May 6th meeting with Modz in Vandalia, Ohio, represented a negotiating session, it is undisputed that plans for the delivery of the Starlight transponders involved in the present suit and detailed discussion of operational features of such transponders took place at the Ohio meeting.[2]

After the May 6th meetings performance on the contract was begun at In-Flight's Columbus, Ohio plant. Eventually, In-Flight began to ship transponders from its Columbus factory (F.O.B. Columbus) to Van Dusen's St. Louis purchasing center. Occasional rush orders were sent directly to the Van Dusen subsidiaries involved in the actual sale of the transponders to retailers. One such delivery was made to the Ohio subsidiary located in Vandalia, Ohio.

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2. It should also be noted that the president of Van Dusen Air, Inc. made several trips to In-Flight's Columbus plant, apparently during the period the contract was being performed. The purposes of these trips were, according to affidavits submitted by Van Dusen "to discuss plaintiff's general business policy, its products and its product distribution system." Production facilities were observed by the Van Dusen official on each of the trips but no "contract, commitment or . . . offer to purchase plaintiff's electronic aviation products" was made during these trips.

On January 12, 1971, Van Dusen issued a check drawn upon a Minnesota bank as partial payment for its transponder order. Three days later it stopped payment on the check, alleging that the merchandise delivered to it was unsatisfactory. In-Flight claims that it had used the check to cover several of its outstanding bills and that the subsequent stop payment order resulted in considerable commercial embarrassment. Its suit sought recovery for both breach of contract and damage to business reputation.

It is settled law in this Circuit that a federal court sitting on a diversity matter must look to the law of the forum state to determine the extent of its in personam jurisdiction. *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 376 n. 2 (6th Cir. 1968); *Velandra v. Regie Nationale Des Usines Renault*, 336 F.2d 292 (6th Cir. 1964); *Smartt v. Coca-Cola Bottling Corp.*, 318 F.2d 447 (6th Cir. 1963).[3] Plaintiff-Appellant asserts that Ohio law provides for jurisdiction over Van Dusen under the circumstances of this case under Ohio Revised Code § 2307.382.[4] It also asserts that the exercise of such juris-

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3. It is also clear that out of state service of process is authorized in the federal courts where the law of the forum state makes provision for such service (and where such service is consistent with due process). Rule 4(d)(7), 4(e), 4(f), Fed. Rules of Civil Procedure. While Ohio Rule of Civil Procedure 4.3 authorizes the use of certified mail service, upon non-resident defendants, such service is effective only where a valid basis for in personam jurisdiction over the defendant exists, as the Ohio Rule implicitly recognizes. This opinion considers the question of whether or not the appropriate jurisdictional basis exists in this case.

4. In relevant part Ohio's long-arm statute (Rev.Code § 2307.382) provides:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the persons:
>
> (1) Transacting any business in this state;
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> * * * * *

(Continued on following page)

diction over Van Dusen is consistent with the due process clause of the Constitution. We now examine the accuracy of these assertions.

Although the Ohio act has not been construed authoritatively by the courts of that State, we are not without guidance as we seek to ferret out the meaning of the legislation. The statute substantially parallels Section 1.03 of the Uniform Interstate and International Procedure Act, which in turn is composed in part of statutory provisions previously adopted in other states.[5] *See,* Comment to § 1.03, "A Uniform Interstate and International Procedure Act," in Handbook of the National Conference of Commissioners of Uniform State Laws (1962), p. 219 et seq. [hereinafter cited as, Uniform Act Comments, Handbook]. As the Comments to the Uniform Act (written long before the adoption of the Ohio act) make clear, the various bases for jurisdiction set forth in the statute exist independent of one another and must be separately considered.[6]

Appellants have relied on Subsection (A)(1)—the transacting any business subsection—as the principal basis for the District Court's assertion of jurisdiction in this

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Footnote continued—

(3) Causing tortious injury by an act or omission in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

5. The parallel has been recognized by the District Courts sitting in Ohio. See Seilon, Inc. v. Brema, S.p.A., 271 F.Supp. 516, 518, N.D.Ohio (1967).

6. Uniform Act Comments, Handbook p. 222.

case. Theoretically, we have to answer two separate questions with regard to this subsection: How far did the legislature intend the "transaction of any business" jurisdiction to extend? and (2) Is such extension consistent with due process? *See Southern Machine Co. v. Mohasco Industries, Inc.*, *supra*, 401 F.2d at 376. Here our real task is simpler since we can conclude that the Ohio legislature intended to extend the jurisdiction of its courts to the Constitutional limits with respect to subsection (A)(1). We come to this conclusion for a number of reasons. Most significant of these is the identity between this subsection and a provision of the Illinois Civil Practice Act,[7] which has been held to extend jurisdiction to the limits of due process. The opinion in which this interpretation of the Illinois provision was set forth, *Nelson v. Miller*,[8] was widely heralded as a decision of major import. Decided a number of years before the Ohio long-arm statute was enacted, the significance of the construction could not have escaped the Ohio legislators during their deliberations. It is the settled rule in Ohio that when comparable legislation has been construed in other jurisdictions prior to the enactment of the Ohio statute, the interpretation put on the law elsewhere is to be given great weight in construing the Ohio Statute. *Schneider v. Laffoon*, 4 Ohio St.2d 89, 212 N.E.2d 801 (1965). Applying this rule we find ample reason to believe that in adopting a provision construed to extend jurisdiction to the Constitutional limits the Ohio legislature intended to achieve an identical result.

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7. Ill.Stat.Ann. c. 110, § 17(1)(a).

8. Nelson v. Miller, 11 Ill.2d 378, 143 N.E.2d 673 (1957); cf. Berlemann v. Superior Distributing Co., 17 Ill.App.2d 522, 151 N.E.2d 116 (1958), which deals explicitly with the "transacting any business" subsection as opposed to the *Nelson* decision's general treatment of the statute

Our belief in the accuracy of this evaluation of legislative intent is reinforced by the fact that other courts which have passed on the question have come to the same conclusion. *Seilon, Inc. v. Brema S.p.A.*, 271 F.Supp. 516, 518-519 (N.D.Ohio, 1967); *Didactics Corp. v. Welch Scientific Co.*, 291 F.Supp. 890 (N.D.Ohio, 1968).

Given this understanding of the broad scope of Subsection (A)(1) of the Ohio long-arm statute, our attention may properly be focused on a single question: Would a determination that the Defendant transacted business in the State of Ohio so as to render it subject to the jurisdiction of the Ohio courts with respect to a cause of action arising from such transaction violate due process under the facts of this case?

In 1945 the Supreme Court mapped the general contours of due process boundaries with respect to the assertion of jurisdiction over non-residents:

> "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair-play and substantial justice." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95.

Since that landmark decision the Supreme Court has made two other highly significant forays into the tangle of in personam jurisdictional principles. In *McGee v. International Life Insurance Co.*[9] the Court made clear the latitude allowed by the Constitution, holding that due process did not prohibit the exercise of jurisdiction based

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9. 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

on the issuance of but a single insurance contract in the forum and the receipt of payments in connection with that policy. The later decision in *Hanson v. Denckla*[10] suggested the limits of the *International Shoe* doctrine, requiring that a defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State. . . ." if long-arm jurisdiction is to be exercised over him. 357 U.S. 235, 253, 78 S.Ct. 1228, 1240.

While the three Supreme Court decisions have provided an overall framework within which to work they do not provide a mechanical test which can eliminate the need to consider the jurisdictional facts of each case individually, to make judgments as to the substantiality of contacts with the forum state and the fairness and justice of subjecting a specific defendant to the in personam jurisdiction of the forum state.

In an effort to focus the case by case inquiry which must be made by the federal courts in considering the due process limits of a "long-arm" statute, this Court has adopted a three-fold mode of analysis in jurisdictional cases where jurisdiction is predicated upon a single act of the defendant.

> "First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable." *Southern Machine Co. v. Mohasco Industries, Inc., supra*, 401 F.2d at 381.

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10. 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

As must be apparent, this approach simply applies in a specific fashion the broad rule requiring substantial minimum contacts as a basis for jurisdiction.[11] The first and second elements of the method merely involve a search for specific types of contacts which have been held to be essential to the maintenance of jurisdiction in the *McGee* and *Hanson v. Denckla* decisions. It is imperative that it be understood that the flexibility, and therein the virtue, of the *International Shoe* test is retained in the third condition and no mechanical consideration of the first two elements of the test can eliminate the need for an appraisal of the overall circumstances of each case if jurisdiction is to be found.

The first aspect of the *Southern Machine* approach relating to the "purposeful doing of an act or causing of consequence within the forum state" is clearly derived from the principles enunciated in *Hanson v. Denckla*. That Supreme Court decision and the *Southern Machine* decision sought to set forth in somewhat more concrete terms one essential element of the "traditional notions of fair-play" required by *International Shoe, supra*. An essential element of such "fairness" in our society has always been that a person is not asked to bear a special burden (such as defending in a foreign forum) unless he has done something in a purposeful manner or with such knowledge as to make his deeds the equivalent of purposeful action. The

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11. See Note, Jurisdiction Over Non-Resident Corporations Based on a Single Act: A New Sole for International Shoe, 47 Georgetown L.J. 42, 352 (1958);

For criticism of the Southern Machine approach as being overly restrictive, see Comment, "Long Arm and Quasi in Rem. Jurisdiction and the Fundamental Test of Fairness," 69 Michigan L.R. 300, 312 (1970). The Southern Machine approach has been applied most recently in this Circuit in King v. Hailey Chevrolet Company and Indiana Trailer Supply, Inc., 462 F.2d 63 (6th Cir., June 16, 1972).

Hanson v. Denckla requirement is simply designed to avoid the situation where the "unilateral activity" of the plaintiff can drag an unsuspecting and unwilling defendant into a foreign forum. *See Hanson v. Denckla*, 357 U.S. at 253, 78 S.Ct. 1228.

With such view of the "purposeful action" requirement in mind, this Court in *Southern Machine* elaborated on that requirement in terms of the "transacting any business" clause of a long-arm statute. In this Circuit one has "acted" so as to transact business in a state "when obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state." Such "acts" become purposeful if the defendant "should have reasonably foreseen that the transaction would have consequences in that state." 401 F.2d 374, 382-383.

In some cases, meeting this requirement may pose the most difficult challenge of all for a plaintiff seeking to establish jurisdiction over a non-resident defendant. Here, however, it seems clear that the defendant acted in such a manner. Van Dusen entered into contract negotiations involving a substantial order for the manufacture of goods with a firm which it necessarily knew was based in Ohio and had its production facilities located within that State. That the making (and breaking) of a contract with the Plaintiff would have substantial consequences with the State of Ohio is a reality of which Defendant could not have been ignorant. *See*, Comment "Long Arm and Quasi In Rem Jurisdiction" *supra*, n. 11 at 322-25. *Cf. Jack O'-Donnell Chevrolet, Inc. v. Shankles*, 276 F.Supp. 998 (N.D. Ill.1967).

The making of a substantial business contract with a corporation based in another jurisdiction has been held to

be adequate to satisfy the requirements of the "purposeful" test of *Southern Machine*. *See Simpson Timber Co. v. Great Salt Lake Minerals and Chemicals Corp.*, 296 F.Supp. 243 (D.Or.1969).[12]

We believe that this holding represents a proper approach.[13] As we have suggested, the purposeful action test

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12. Cf. Royce and Mason, "Non-Resident Jurisdiction in Business Litigation", 53 Chicago Bar Record 100 (Dec. '71), 161 (Jan. '71). The authors conclude that the state courts of Illinois and the federal courts in the Seventh Circuit have placed great emphasis on the establishment of a "business relationship."

> "Unless Illinois has no interest in the matter or the abilities of the parties to litigate in Illinois is disproportionate the Courts will generally sustain jurisdiction whenever the defendant has voluntarily and knowingly entered into a business relationship with a person in Illinois and could reasonably anticipate that his actions would have consequences in this State." 53 Bar Record 161, 162.

See Ziegler v. Houghton-Mifflin Co., 80 Ill.App.2d 210, 224 N.E.2d 12 (1967).

13. The *Simpson Timber* decision, cited in the text, relied upon the intentional entering into of a business contract with a resident of the forum state as a sufficient basis for the exercise of jurisdiction, at least where the greater portion of performance under such contract was to take place within that state. The Court essentially limited its consideration to the facts of the case before it and did not acknowledge the possibility that such "rule", broadly applied, could create unfairness in many situations.

Fearful of the commercial havoc which a wooden application of the *Simpson Timber* decision could create, several district courts have condemned the conclusion of the Oregon Court, apparently suggesting that merely entering a contract of the sort involved in *Simpson Timber* could never be enough to justify jurisdiction. See McQuay, Inc. v. Samuel Schlosberg, Inc., 321 F.Supp. 902 (D.Minn., 1971); Geneva Industries, Inc. v. Copeland Construction Corp., 312 F.Supp. 186 (N.D.Ill., 1970).

While accepting the criticism of *Simpson Timber* contained in the latter decisions, we believe the wholesale condemnation of the general principle announced in that case can accurately be characterized as throwing the baby out with the bathwater.

The intentional entering into a contract relationship with a resident of the forum is an important, but not necessarily decisive, factor in the overall evaluation of jurisdictional propriety. As *McQuay* and *Geneva Industries* point out, it would certainly be

(Continued on following page)

is merely a baseline requirement, designed to insure that the defendant has become involved with the forum state through actions freely and intentionally done. It seeks to avoid the assertion of jurisdiction in a situation where all contacts result entirely from a decision made by plaintiff as was the case in *Hanson v. Denckla*. Certainly the intentional entering into a contractual relationship with a resident of the forum state is sufficient to protect against the *Hanson v. Denckla* problem and so to meet the purposeful action requirement.

We hasten to add, however, that as a baseline requirement even the presence of a purposeful act within or affecting the forum state in any case involving jurisdictional questions cannot eliminate the need to complete the analysis required by *Southern Machine* and the Supreme Court cases which are its progenitors. We can properly say this Defendant—by virtue of its intentional entering of a contract to be performed in Ohio—"transacted business"

Footnote continued—

unfair to hold consumers answerable in a foreign forum for unpaid bills simply on the basis of a "mail order contract." Similarly, it may be unfair to hold even a small businessman to answer in such forum when he has done no more than fill out a standard order form for a relatively small purchase.

The unfairness inherent in asserting jurisdiction over such defendants can be dealt with under the *Southern Machine* approach without rejecting the idea that entering a contract can, at least, constitute the "intentional doing of an act" required by the first part of that analysis. The third party of the *Southern Machine* approach requires an investigation of the general fairness of the assertion of jurisdiction—and it is at this stage that the consumer—and perhaps the small businessman engaged in intrastate activities can expect to be protected against improper use of the long-arm power. See *Royce* and *Mason*, *supra*, n. 12 at 166. *Cf.* Currie, "The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois," 1963 Univ. of Illinois L.F. 533, 574-78.

The factors which must go into an evaluation of the fairness of a particular assertion of jurisdiction based upon the entering of a single contract with a resident of the forum state will be discussed later in the text of the opinion.

in that State.[14] Whether under all the circumstances of this case jurisdiction can be sustained yet remains to be seen.

We therefore turn our attention to the second phase of the *Southern Machine* approach and pose the question relevant thereto: Did the cause of action asserted arise out of the Defendant's transaction of business in the forum state?[15]

In answering this question we must consider separately the two causes of action set forth by Plaintiff-Appellant.[16]

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14. In so holding we of course accept the contention that the Ohio statute's "transacting business" subsection properly may be applied to a single act of the defendant committed within or affecting Ohio. Such conclusion follows naturally from our acceptance of the principles first announced in *Southern Machine*. See 401 F.2d at 384 n. 31; 385 n. 33. *Cf.* Didactics Corporation v. Welch Scientific Corp., 291 F.Supp. 890, 894-895 (N.D.Ohio, 1968); *Currie, supra*, n. 13 at 565 and cases cited therein.

15. This is, of course, a requirement explicitly imposed by the Ohio statute as well as by due process itself.

16. At least one commentator suggests that it is usually inappropriate for the courts to conduct a separate jurisdictional analysis for each claim raised by a plaintiff:

> "When a court has jurisdiction over a defendant with regard to one of the plaintiff's claims and the plaintiff has other claims that may be properly joined and that will not impose any additional burden on the defense, there should be no concern with whether jurisdiction may constitutionally be asserted over these less included claims. Jurisdiction should be asserted with reference to the particular fact situation, not with reference to the plaintiff's claims considered in isolation." Comment, "Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness," 69 Michigan L.R. 300, 318 (1970); compare, Jack O'Donnell Chevrolet, Inc. v. Shankles, 276 F.Supp. 998, 1002 (N.D.Ill.1967).

There is much merit in this view; considerable inconvenience and expense could be spared by its application in an appropriate case.

It is our reluctant conclusion that this is not such a case. As the Michigan Law Review article itself recognizes, its so-called, "Lesser Included Claim" approach is properly applicable only where assumption of jurisdiction over the second claim does not "impose any additional burden on the defendant," that it does

As to the first—the alleged breach of contract by Defendant—there can be no problem whatever with regard to this second aspect of the *Southern Machine* approach. Defendant's transaction of business in Ohio—its entering of a contractual relationship with an Ohio corporation—is necessarily the very soil from which the action for breach grew. The intimate relationship between the jurisdictional basis and the cause of action necessary to the validity of any single act long-arm jurisdictional assertion cannot be denied here.

The second cause of action relates to the alleged injury to In-Flight's business reputation caused by Van Dusen's stopping of payment on a check issued to satisfy outstanding obligations under the purchase contract. At the very outset of our deliberations on this point we are met

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Footnote continued—

not "involve different factual proofs. . . ." 69 Mich.L.R. at 318, 319. Here very different proof would be required to defend against the contract and tort claims despite the fact that both causes of action have their genesis in the stop payment order issued by defendant.

While both claims involve interpretation of the contract terms, the tort claim also must include evaluation of what damage, if any, was done to plaintiff's business reputation, as well as the foreseeability of injury itself. These are potentially thorny factual questions and the defendant should not be compelled to answer in a forum not otherwise appropriate, simply because the related breach of contract action is to be heard in that forum. (We assume that the exercise of jurisdiction over the contract claim is itself proper. See text *infra*.)

Thus we find it necessary in this case to determine separately whether jurisdiction exists over the tort claim. Our evaluation of whether or not it is fair to assert jurisdiction over such claim is not made in a vacuum, however. We are aware of the considerations of convenience and judicial economy which suggest a common forum for all claims arising from a common factual pattern and we take these considerations into account in making our decision with respect to the tort claim. See, Comments of Uniform Act, Handbook, p. 224; *cf.* Comment, "Long-Arm and Quasi in Rem Jurisdiction," supra, 69 Mich.L.R. 300, 320.

by a problem. Can a claim sounding in tort arise from the transaction of business for purposes of the long-arm statute? First examination of the Ohio statute would suggest that it cannot. Two sections are devoted exclusively to jurisdiction over tortious actions and one—subsection (A)(4)—specifically addresses itself to acts committed outside the state (the stopping of the check here, for instance), causing injury within the state. Before subsection (4) can apply it must be shown that the defendant "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state."[17] If the only guidance available to us was the familiar rule requiring that the more specific be preferred to the general we would have to say that a tort claim such as the present one is governed exclusively by subsection (A)-(4) and we, like the District Court would have serious doubts as to the applicability of that section here given the subsection's requirements.

We have been furnished further guidance, however. The comments to the Uniform Act, which Act was adopted in toto (and supplemented with an additional ground for jurisdiction not here relevant) by the Ohio legislature, indicate a definite intention that the result suggested in the last paragraph should not obtain. The comments state: "Each of the subdivisions will support a cause of action *under any theory of law*. For example, a claim arising from 'transacting business' may sound in contract, tort, or quasi contract." Uniform Act Comments, Handbook p. 222. (Emphasis added). In the absence of any suggestion that the Ohio draftsmen desired a result contrary to that contemplated by the Uniform Act, we must

17. Revised Code Section 2307.382(A)(4).

assume subsection (A)(1) is intended to cover causes of action sounding in tort.[18]

We recognize that this interpretation is not without problems. It would seem that the relatively strict limits set on jurisdiction over torts by subsection (A)(4) could be effectively circumvented by a broad reading of the expansively drafted subsection (A)(1) so as to include a wide range of tortious acts. The potential scope of the problem is significantly reduced by the fact that jurisdiction under subsection (A)(1) can be invoked only where the cause of action arises from the transaction of business. In many cases the transaction of business within the forum state and the tortious act may be totally unrelated forcing the plaintiff to rely exclusively on subsection (A)(4).

However, there appear to be situations where subsection (A)(1) reliance would lead to a decision sustaining jurisdiction, while reliance on the narrower subsection (A)(4)—specifically designed to deal with torts—would yield a different result. Allowing such an anomalous result would clearly do violence to the statutory intent. Yet the solution cannot be to hold that subsection (A)(1) contemplates no jurisdiction over any torts whatever. The comments authored by the draftsmen responsible for the statute's form would not support such conclusion.

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18. The United States District Courts sitting in Ohio have given substantial weight to the comments to the Uniform Act in general. See Seilon, Inc. v. Brema, S.p.A., 271 F.Supp. 516, 518 (N.D.Ohio 1967); Stewart v. Bus and Car Co., 293 F.Supp. 577 (D.C.1968).

In *Stewart* the District Court specifically entertained the idea that a tort action could find jurisdictional support in subsection (A)(1)—transacting any business within the state. While not required to pass on to the issue the Court implicitly accepted the fact that jurisdiction might exist in such cases.

The answer to the dilemma can be found, we believe, in an investigation of what the statute's draftsmen sought to avoid by the use of the restrictive language of subsection (A)-(4). Again our task has been made easier by the rather explicit comments of the Uniform Act's draftsmen.

"The rule (of subsection (A)(4)) is more restrictive than the Illinois statutes, as interpreted in *Gray v. American Radiator and Standard (Sanitary) Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961)." Uniform Act Comments, Handbook p. 223. In the *Gray* decision the Illinois Supreme Court sustained jurisdiction over an Ohio defendant which had manufactured a valve incorporated into a radiator produced in Pennsylvania and ultimately sold to a person injured in Illinois as a result of the radiator's malfunction. In its landmark decision the Illinois court chose to disregard the indirect path by which defendant's product had found its way to Illinois and to sustain jurisdiction over the defendant. The drafters of the Uniform Act and apparently those of the Ohio Act as well drew back from this result. *See Stewart v. Bus and Car Co.*, 293 F.Supp. 577, 580 (N.D.Ohio, 1968). The explicit rejection of the *Gray* result by the drafters of subsection (A)(4) suggests that in molding that subsection they were concerned with the same situation as that which concerned the court in *Gray*: The assertion of jurisdiction over a non-resident manufacturer whose allegedly defective goods have produced injury within the state.

The reasons for the drafters' reluctance to follow *Gray* in the products liability field are not difficult to fathom. *Gray* accepted the proposition that a non-resident defendant becomes subject to the jurisdiction of the forum state when he does an act which he should anticipate will involve him with the state in such manner as to

make jurisdiction reasonable. The Illinois Supreme Court held that such anticipation or expectation should properly exist whenever a manufacturer puts a product into the stream of national commerce for ultimate interstate distribution. See 22 Ill.2d at 441-443, 176 N.E.2d at 766.

In applying *Gray* many courts have found the requisite expectation of involvement with the forum state in situations where the defendant could not realistically have anticipated that his product would wind up in the particular forum state. In many instances the defendant's expectations have become a construction of the judicial imagination, more fictional than real. See Comment, "Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness," 69 Michigan L.R. 300, 322 (1970). In reaction to this gap between fiction and reality the courts and draftsmen of some long-arm acts have apparently sought to insure that some significant involvement with the forum state exists in those situations, such as the typical products liability case, where the reality of a defendant's expectations may be difficult to gage. The somewhat restrictive language of subsection (A)(4) of the Ohio Act would seem the result of such approach.

The problem which the limiting language of subsection (A)(4) seeks to deal with simply does not exist, however, in most situations where the non-resident defendant is himself a businessman and has entered a contractual or other commercial relationship with a fellow businessman after negotiations of any sort. In such situation the defendant surely knows that he is dealing with a resident of the forum state, having dealt directly with him. This contrasts markedly with the situation in *Gray* and other products liability cases where the defendant never comes into direct contact with the specific plaintiff, and may not

even know in advance whether any of the millions of potential customers along the product distribution route resides within the forum state. *See Keckler v. Brookwood Country Club*, 248 F.Supp. 645, 650 (N.D.Ill.1965). The distinction between the type of situation involved in *Gray* and that involved in the usual commercial transaction between businessmen persists whether the ultimate cause of action growing out of the commercial relationship is one in contract or in tort, at least so long as any tort action relates to the business substance of the relationship rather than a claim for personal injury or the like.

Given the existence of such a marked distinction between the *Gray* type situation which apparently provided the focus for the restrictions of subsection (A)(4) and the circumstances which obtain in the typical "business tort" case, we believe that both the restrictive intent of the legislature as revealed in subsection (A)(4) and the potentially conflicting intent to make subsection (A)(1) available for tort as well as contract actions can be implemented by holding that subsection (A)(4) does provide the sole basis for long-arm jurisdiction over some, but not all tortious acts committed outside the state and having an effect within the state.

To the extent the relationship between the parties parallels that in *Gray*, subsection (A)(4) should provide the exclusive basis for a tort action in order to ensure that the legislature's restrictive intentions with respect to such situation is not thwarted.[19] Where, however, a tort action has its roots in a commercial relationship between busi-

19. In many products liability cases a plaintiff may seek to base jurisdiction on subsection (A)(5) of the long-arm act with respect to warranty claims. The availability of such subsection does not undermine the restrictive intent of the legislature with respect to the *Gray* type transaction, however, since the strict requirements of subsection (A)(4) are repeated in (A)(5).

nessmen, and where the cause of action relates to commercial aspects of that transaction, jurisdiction may be predicated upon the defendant's transaction of business within the state, regardless of whether the action technically sounds in contract or tort; provided, of course, that the requirements of due process as described elsewhere in this opinion are met fully.

Although the Ohio courts and the federal courts sitting in Ohio may assert jurisdiction over a non-resident defendant in connection with a business tort claim where such defendant has merely transacted business within Ohio, the exercise of such jurisdiction could not be held proper under the *Southern Machine* approach unless the particular cause of action in question itself arose from that transaction of business.

The very same act—the stop payment order to Defendant's bank—which constituted the alleged breach of contract here is also the act which Plaintiff alleges constituted tortious misconduct. Both acts and their consequences were made possible only by Van Dusen's transaction of business with In-Flight, by its entering into a contract with In-Flight. Under the circumstances we believe that the cause of action for damage to business reputation grew directly from the transaction of business in Ohio. Such conclusion is consistent with the construction of the long-arm act suggested by the comments to the Uniform Act: "The concept of cause of action or claim for relief should be broadly construed to cover an entire transaction so that, when possible, the entire dispute may be settled in a single litigation. Subdivision (B) is designed to prevent assertion of independent claims unrelated to any activity in subdivision (A) of [the section]." Uniform Act Comments, Handbook p. 224. Far from be-

ing "unrelated" the claim in question is intimately tied to Defendant's transaction of business in Ohio.

Thus as to both causes of action, two of the three hurdles imposed by *Southern Machine* have been surmounted. The third, and in many ways the most significant aspect of the *Southern Machine* analysis must now be considered: Does the Defendant have sufficient contact with Ohio to make the exercise of jurisdiction over it reasonable?

One aspect of this question must involve consideration of the extent of Ohio's interest in this controversy. *See Southern Machine, supra,* 401 F.2d at 384. It cannot be disputed that a state has an interest in resolving a suit brought by one of its residents. *See Southern Machine, supra* at 385; *Thompson v. Ecological Science Corp.*, 421 F.2d 467, 470 (8th Cir. 1970); *Washington v. Hospital Service Plan of New Jersey*, 120 U.S.App.D.C. 211, 345 F.2d 105, 108 (1965). That interest necessarily becomes more significant when, as here, a contract calling for substantial production of goods is entered into, with the production of goods and other performance under the contract to take place entirely within the forum state. *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971); *Seilon, Inc. v. Brema, S.p.A.*, 271 F.Supp. 516, 520 (N.D.Ohio, 1967); *cf. Ziegler v. Houghton-Mifflin Co.*, 80 Ill.App.2d 210, 224 N.E.2d 12, 13 (1967); *Currie, supra*, n. 13, 563-579. Holding a defendant answerable for his failure to perform the obligations imposed upon him by such a contract is consistent with Ohio's expressed policy of securing to its businessmen the benefit of their bargains.

The strength of Ohio's interest in resolving the present conflict goes a long way toward resolving the question of whether or not the assertion of jurisdiction over the Defendant here is fair and reasonable. It does not conclude the matter, however. It is apparent that Ohio would have

at least some interest in resolving a contractual dispute, for example, between a non-resident consumer and an Ohio mail order company which sought to collect an unpaid bill from the consumer. Yet it is unlikely that the Ohio courts could or should assert jurisdiction over the consumer. *See Geneva Industries, Inc. v. Copeland Construction Corp.*, 312 F.Supp. 186 (N.D.Ill.1970); *McQuay, Inc. v. Samuel Schlosberg, Inc.*, 321 F.Supp. 902 (D.Minn.1971). Commentators have recognized the unfairness of asserting jurisdiction over such a consumer, but have been hard-pressed to identify the factors leading to such decision. *See Currie, supra*, n. 13 at 574-77; *Royce and Mason, supra*, n. 12 at 165.

We believe the assertion of jurisdiction over the Defendant is fair in this case. We will not attempt to articulate a general standard by which courts may distinguish between the fair and the unfair—the very flexibility of the terms deliberately chosen by the Supreme Court in *International Shoe* precludes the possibility that definitive standards can be created. In an effort to provide at least some assistance to the District Courts which must make the bulk of the jurisdictional decisions, however, we will attempt to set forth some of those considerations which have led us to distinguish this case from the "mail order" situation where the assertion of jurisdiction would, by apparently unanimous consent, be inappropriate.

First we must comment on a superficial similarity between the present situation and the typical consumer collection suit: The status of the defendants as "buyers" in both cases. We do not believe that this similarity requires a common result in the two cases.

Courts frequently have distinguished between buyer and seller in applying long-arm statutes, *see Oswalt Industries, Inc. v. Gilmore*, 297 F.Supp. 307, 312-313 (D.Kan. 1969); *cf.* cases collected in Annotation, 20 A.L.R.3d 1201 (1968). Jurisdiction has more often been assumed over non-resident sellers than over non-resident buyers. *See Oswalt, supra.* To an extent the bias reflected in such fact is justified. *See Currie, supra*, n. 13 at 576.[20] In our economy the seller often initiates the deal, tends to set many, if not all of the terms on which it will sell, and, of course, bears the burden of producing the goods or services, in the course of which production injuries and other incidents giving rise to litigation frequently arise. The buyer, on the other hand is frequently a relatively passive party, simply placing an order, accepting the seller's price and terms as stated in his product advertising and agreeing only to pay a sum upon receipt of the goods or services. It is understandable that sellers more often seem to have acted in a manner rendering them subject to long-arm jurisdiction.

The mere fact that a buyer is the defendant in a long-arm situation should not preclude an assertion of jurisdiction over such defendant, however. *See Currie, supra* at 576; *Kropp Forge Co. v. Jawitz*, 37 Ill.App.2d 475, 186 N.E.2d 76 (1962). To the extent the buyer vigorously negotiates, perhaps dictates, contract terms, inspects production facilities and otherwise departs from the passive buyer role it would seem that any unfairness which would normally be associated with the exercise of long-arm jurisdiction over him disappears. Such buyer conduct is

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20. For a recent decision requiring rather substantial contact with the forum by a non-resident buyer before jurisdiction will be sustained, see "Automatic" Sprinkler Corporation of America v. Seneca Foods Corporation, 280 N.E.2d 423 (Mass. Supreme Judicial Court, 1972)

far more typical in dealings between large business organizations, of course, than in dealings involving consumers or even those involving a small shopkeeper purchaser and a large manufacturer. In the present instance we believe the substantial negotiations over contract terms, the discussions between Defendant and Plaintiff over marketing approaches, the inspection of production facilities by Defendant all suggest that Van Dusen was not simply a passive purchaser. Under such circumstances we do not believe Van Dusen's position as a purchaser should in any way protect it from the grasp of the long-arm. The buyer/seller distinction may have value in general, but only to the extent it is used as a short-hand means of expressing the differences between passive and active involvement in a transaction. Where the passivity characterizing some buyers is absent, as in the case here, the distinction is of little significance.

One factor which has been identified as making the assertion of jurisdiction over a non-resident unfair in a given case is the sense of surprise—the disappointment of expectation—which may result from the use of long-arm jurisdiction.[21] A purchaser who engages in an essentially

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21. As is suggested in the text, a precise definition of "fairness" in the present context is impossible. At least one commentator has attempted to separate some of the factors which may go into any decision on fairness, however.

> "Probably the most that can be said in a general way is that due process embodies a test of fundamental fairness in all steps of the proceedings; and that our sense of fairness is outraged by certain assertions of jurisdiction on the part of States unconnected with the parties or with the controversy; and that this sense of unfairness stems partly from the inconvenience and expense involved, partly from the idea of unfair surprise, partly from the anticipation of an improper choice of law, and partly from general notions of the limits of a state's rightful sovereignty." *Currie, supra*, n. 13 at 535.

We are convinced that in the circumstances of this case the assertion of jurisdiction over the Defendant offends none of the interests set forth in this analysis. The considerations of expense

one state operation—and occasionally buys an item or two out of state, for instance, is far more likely to be unprepared to deal with out of state litigation than an individual or corporation whose business frequently involves him or it in interstate transactions.[22] The existence of substantial interstate business in general cannot substitute for some direct contacts with the forum state under the first test of *Southern Machine*, of course, but where such direct contact consists primarily of the entering of a contract with a resident of the forum state by the non-resident defendant the general interstate involvement of the defendant is suggestive of the latter's expectation that it may be involved in litigation far from its home base. Here, the parent Van Dusen Corporation's in-house operations are spread across state lines with its headquarters in Minnesota and its purchasing operations centered in Missouri. Its dealings with its subsidiaries alone—treating such subsidiaries as the independent entities Van Dusen asserts them to be[23] involve dealings with corporate "residents"

Footnote continued—

and surprise, to the extent we believe them relevant, are discussed in the text above. We believe that any questions raised by the limits of state sovereignty are adequately disposed of by our decision that Ohio has a substantial interest in this controversy.

As to the fourth consideration which *Currie* suggests can lead to unfairness—the possibility that the courts of a particular forum may apply the wrong substantive law in dealing with non-residents—we believe that this danger exists whenever any long-arm statute is applied. It is no more a threat here than in other cases and we do not consider it to be of significance in determining whether or not unfairness exists in this particular case.

22. See Von Mehren and Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv.L.Rev. 1121, 1167 (1966). The authors put forth a functional analysis of jurisdictional problems, suggesting that among other factors to be considered in determining whether a court has in personam jurisdiction over the defendant is whether or not such defendant typically participates in interstate business.

23. See note 25 infra.

of states spread across the country. It can hardly surprise Van Dusen or disappoint its general expectations that it is called upon to defend in a forum far from its home base(s).[24]

Just as unfairness may exist when a defendant is unprepared in some psychological sense to defend in a foreign forum it may also exist when he is financially unprepared to defend in such forum.[25] We speak here not merely of inconvenience or of the financial hardship litigation in the forum state may pose, but of the sort of inability to litigate which leads to the acceptance of default judgments. A Minnesota consumer, perhaps even a Minnesota grocery store ordering a product from an Ohio manufacturer may well not be prepared to meet the costs of out of state litigation. Such is not the case with business having a substantial volume of activity outside its home base. Necessarily it is prepared to litigate disputes outside such base area. Van Dusen obviously falls into this latter category and it would not seem that the assertion of jurisdiction over it is unfair in this respect as such assertion over a consumer or small local business might be.

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24. A party in Van Dusen's position desiring to eliminate the possibility of out of state litigation could do so by avoiding any contractual relationship with an out of state resident, of course. A more practical alternative however might be to stipulate in the contract the forum of choice. In recent years most courts have given effect to such stipulations where the forum chosen is reasonable and the contract involved is not one of adhesion. See, for example, Central Contracting Co. v. Maryland Casualty Co., 367 F. 341 (3d Cir. 1966); but see Indussa Corp. v. S. S. Ranborg, 377 F.2d 200 (2d Cir. 1967). This year it would seem that the Supreme Court gave conclusive sanction to the practice of accepting such stipulations as binding in appropriate circumstances. M/S Bremen and Unterweser, Reederei, GMBH v. Zapata Off-Shore Company, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513, decided June 12, 1972. Although the Supreme Court decision came in the context of a choice between a forum in this country and one in England, the principles announced in it would seem equally applicable to domestic choice of forum questions.

25. *Currie, supra*, n. 13 at 535.

One indicia of fairness which courts have frequently been concerned with is the nature and quantity of the defendant's physical contacts with the forum state. Physical *presence* in the state is not a prerequisite to the assertion of jurisdiction over the defendant. *See Southern Machine v. Mohasco, supra,* 401 F.2d at 382. Neither does its existence alone establish a sufficient basis for such jurisdiction, id. at n. 18 and cases cited therein. Nevertheless the nature of the direct physical contacts between defendant and plaintiff may be useful in a close case as a gauge of the significance the parties attach to the events occurring in the forum state and thus of their expectations. A defendant which, like Van Dusen, felt it wise to send its agent into another state to discuss implementation of a contract and to inspect production facilities may be exhibiting a greater involvement with the forum state than a defendant who is content merely to write a letter relating to these matters. Again it must be emphasized that no particular type of physical contact is required as a jurisdictional prerequisite. A letter or a telephone call may, in a given situation, be as indicative of substantial involvement with the forum state as a personal visit by the defendant or its agents. Certainly in an appropriate case the entering of a contract to be performed within the forum state may provide sufficient basis for the assertion of jurisdiction over a nonresident defendant without the physical presence of such defendant or his agents within the state. The presence or absence of the defendant, the nature of its communications with the resident party are relevant to jurisdictional questions—not because of any antiquated idea that physical presence is a jurisdictional prerequisite imposed by the limits of state sovereignty. They are relevant because they provide a clue to the significance attached by the defendant to the activities

occurring within the forum state—and thus a clue as to his expectations. In this case we believe the visit paid to Ohio by Mr. Modz on May 6, 1970 and the visits of Van Dusen's president on general inspection trips of Plaintiff's facilities are suggestive of some ongoing concern with Plaintiff's activities in Ohio.[26]

Our emphasis throughout this discussion has been not on providing mechanical rules which can be followed with commendable precision, but on realistic appraisals of the merits of any jurisdictional question. This approach is consistent with the broad language of the long-arm statute we construe and the liberalizing trend in the interpretation

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26. We do not rely on any negotiations which may have taken place in Ohio as support for our decision. It should be noted, however, that substantial contract negotiations taking place within the forum state have been held to be a sufficient basis upon which to predicate jurisdiction. See Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951 (2d Cir. 1967); National Gas Appliance Corp. v. AB Electrolux, 270 F.2d 472 (7th Cir. 1959) cert. den. 361 U.S. 959, 80 S.Ct. 584, 4 L.Ed.2d 542 (1960); Thompson v. Ecological Science Corporation, 421 F.2d 467 (8th Cir. 1970). *Cf.* Kropp Forge Co. v. Jawitz, 37 Ill.App.2d 475, 186 N.E.2d 76 (1962); Iroquois Gas Corporation v. Collins, 42 Misc.2d 632, 248 N.Y.S.2d 494 (N.Y. Supreme Court, Special Term, 1964). We believe that the negotiations assertedly undertaken in Ohio in this case could provide the basis for jurisdiction if properly established at a fact finding hearing or at trial. Our disposition of this case makes it unnecessary to rely on these negotiations, however.

We note also the presence in Ohio of Van Dusen's Ohio subsidiary. The well established rule is, of course, that the mere presence of a corporate subsidiary does not give jurisdiction over the parent. See Valendra v. Regie Nationale Des Usines Renault, 336 F.2d 292, 296 (6th Cir. 1964). The separation of the parent corporation from the commerce of the state, however, must be real and not merely superficial to insulate it from in personam reach of the state's courts. See Southern Machine, *supra*, 401 F.2d 374, 382 n. 25; Moore-McCormack Lines, Inc. v. Bunge Corporation, 307 F.2d 910 (4th Cir. 1962). The direct purchases made by the Ohio subsidiary, short-circuiting the normal distribution route through the parent, the negotiations carried on for the parent by the officer of another subsidiary and other circumstances suggest that the relationship between parent and subsidiary here may be such as to suggest that the parent forfeited its insulation. We do not believe it necessary to rely upon the subsidiary's activities to support jurisdiction here, however.

of due process which has flowed in the wake of the *International Shoe* decision. We believe it is imperative that courts avoid resort to artificial guidelines which simplify decision making, but obscure the realities of the situation. The courts must consider each long-arm question in relation to traditional notions of fairplay which mark the outer limits of due process.

It is our opinion that the exercise of jurisdiction over the Defendant in this case is permitted under Ohio's long-arm statute[27] and that such extension of jurisdiction does not violate those notions of fairplay defining due process. Accordingly the judgment of the District Court is reversed and the cause remanded for further proceedings consistent with this opinion.

---

27. Our conclusion that subsections (A)(1) and (B) of the Ohio statute cover all aspects of this case makes it unnecessary for us to construe the other potentially relevant portions of subsection (A) in any great depth.

OPINION OF SIXTH CIRCUIT IN THE CASE OF M & W CONTRACTORS, INC. v. ARCH MINERAL AND EADS COAL CO., 466 F.2d 339 (1972)

(September 6, 1972)

No. 72-1110

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

M & W CONTRACTORS, INC.,
Plaintiff-Appellant,

v.

ARCH MINERAL CORPORATION and
EADS COAL COMPANY,
Defendants-Appellees.

Before: EDWARDS, PECK and KENT, Circuit Judges.

PER CURIAM. M & W Contractors, Inc., an Ohio corporation, executed two essentially similar contracts with the appellees, Arch Mineral Corporation and Eads Coal Company, under which M & W was to supply all necessary petroleum products and equipment for use in appellees' mining operations during a specified five-year period. Arch Mineral and Eads are Delaware corporations, with

their principal places of business in Missouri; Arch Mineral contracted for sale of the petroleum products and equipment at its Alabama mine and the contract with Eads called for sale of the products in Illinois. After commencement of performance on the contracts, M & W brought this breach of contract action against the appellees in the District Court for the Southern District of Ohio. Appellees moved to dismiss the suit, which motions were granted on the ground that the District Court lacked personal jurisdiction over appellees under the Ohio "long arm" statute, Ohio Revised Code § 2307.382.

The result in this appeal is controlled by our decision in *In-Flight Devices v. Van Dusen Air, Incorporated,* etc., ... F.2d ..... (No. 71-1948, decided August 10, 1972). In that case jurisdiction was found to have been properly invoked as to a non-resident buyer who actively engaged in substantial interstate business including conducting business in Ohio, who participated vigorously in contract negotiations with an Ohio seller and who entered into a contract calling for a substantial production of goods, the breaking of which allegedly had substantial consequences upon the Ohio seller. We determined this to be fundamentally fair in contrast to the unfairness which would result from asserting jurisdiction in the typical "mail order" situation. Therein the buyer "is frequently a relatively passive party, simply placing an order, accepting the seller's price and terms as stated in his product advertising and agreeing only to pay a sum upon receipt of the goods." *In-Flight Devices, supra,* (slip opinion p. 21).

The circumstances of the instant case fit well into the former category, as Arch Mineral and Eads are no "passive purchasers" being unsuspectingly and unfairly dragged in-

to a foreign forum.[1] We regard the presence of meaningful, lengthy negotiations in Ohio, the fact that appellees' Vice President resided in Ohio during the negotiations and that an Ohio corporation, M & W, had a considerable financial interest in the performance of its contracts with the foreign corporations as indicia of the fairness of requiring them to litigate issues arising from the breach of the contracts negotiated in Ohio. *See Thompson v. Ecological Science Corp.*, 421 F.2d 467 (8th Cir. 1970).

Upon consideration of the briefs and record and of the arguments of counsel, it appearing that the conclusions of law of the District Court are not in agreement with this Court's decisions in *In-Flight Devices v. Van Dusen, Inc., supra,* and *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968), it is concluded that the judgment of the District Court must be reversed and the cause remanded for further proceedings consistent herewith.

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1. We note that *In-Flight Devices, supra,* utilized a three-part test in determining the personal jurisdiction of the foreign buyer, Van Dusen Air, Inc., which approach this Court had first recognized in *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968). It is clear that the first two parts of the test of *In-Flight Devices, supra,* (slip opinion pp. 9-13) were satisfied by the facts of the instant case. First, the defendants purposefully availed themselves of the privilege of acting in the State of Ohio by engaging in contract negotiations in Ohio. Second, the cause of action against the defendants herein arose out of the contractual relationship with the Ohio seller. Thus there remains to be determined only whether the third branch of the test, the sufficiency of the defendant's state contacts was met. This third branch was paraphrased in *In-Flight Devices, supra,* (slip opinion p. 19) as follows: "Does the Defendant have sufficient contact with Ohio to make the exercise of jurisdiction over it reasonable?"

FILE COPY

FILED

In the Supreme Court of the United States

October Term, 1972

No. 72-[illegible]

KEMP O. HIATT,
Petitioner,

vs.

STANADYNE, INC.,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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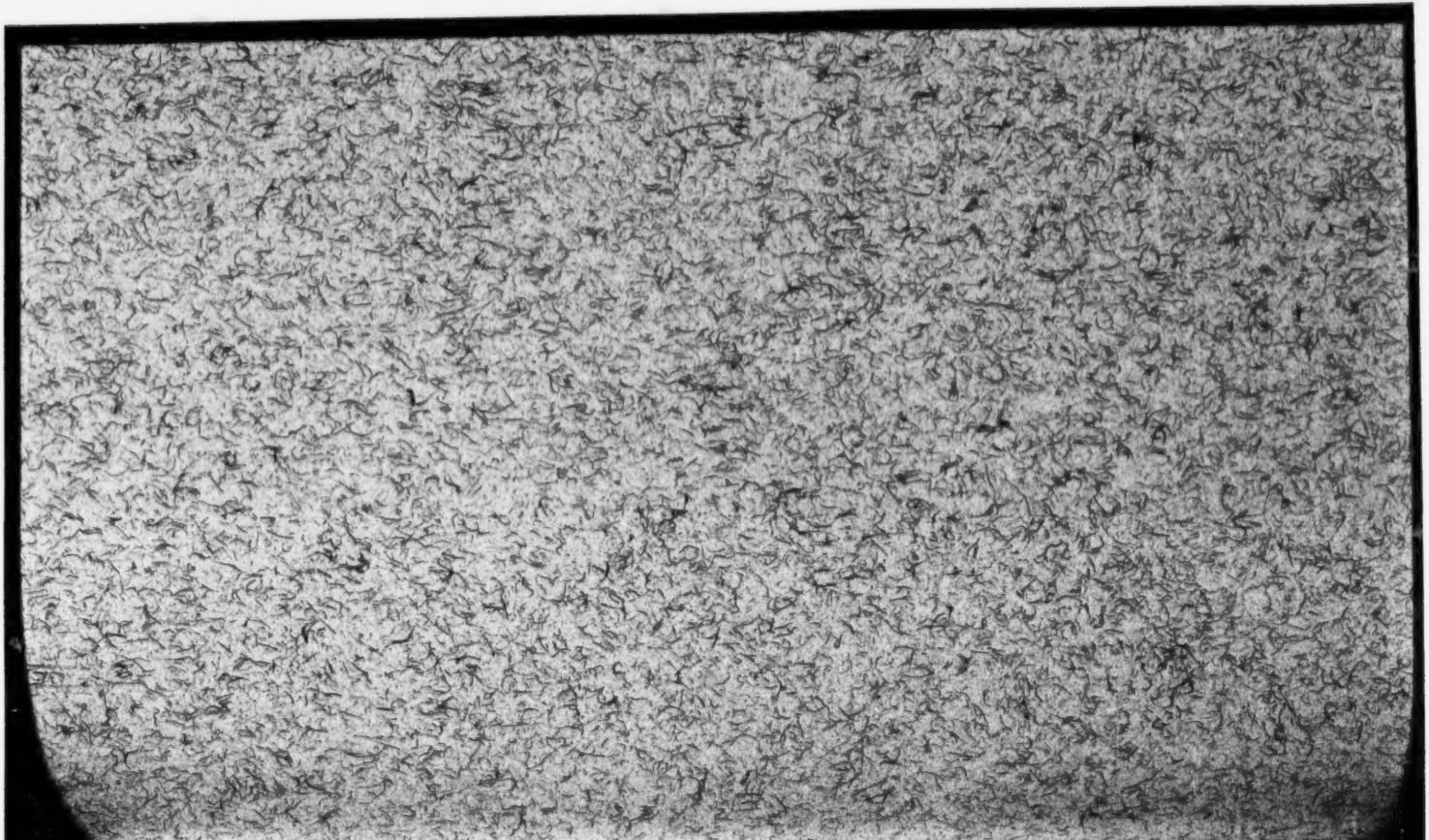

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In the Supreme Court of the United States

October Term, 1972

No. 72-999

KEMP O. HIATT,
Petitioner,

vs.

STANADYNE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Identification of the opinions delivered in the courts below is set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The constitutional provision (U.S. Const. amend. XIV, § 1) and the rules (Fed. R. Civ. P. 4(d)(7) and 4(e); Ohio R. Civ. P. 4.3(A)(1)) involved are set forth in the Petition at pp. 2-4.

QUESTION PRESENTED FOR REVIEW

Whether consistent with the due process requirement of the Fourteenth Amendment to the United States Constitution, personal jurisdiction can be obtained in Ohio over a nonresident individual pursuant to Rules 4(d)(7) and 4(e) of the Federal Rules of Civil Procedure and Rule 4.3(A)(1) of the Ohio Rules of Civil Procedure, where the individual has purposefully availed himself of the privilege of acting or causing a consequence in Ohio, the cause of action arises from the individual's activities in Ohio, and the acts or consequences of the individual have substantial enough connection with Ohio to make jurisdiction over him reasonable.

STATEMENT OF THE CASE

During the early 1940's, the United States Patent Office granted a patent to Alfred M. Moen ("Moen") upon an invention for a single handle, core-type faucet ("Moen core faucet invention"). By an agreement dated May 14, 1945 ("1945 Agreement"), Moen granted to his then employer, Kemp O. Hiatt ("Hiatt"), petitioner, an exclusive license to manufacture and sell the Moen core faucet invention subject to the payment of royalties by Hiatt to Moen (App. 11).[1]

In 1947 Hiatt incorporated his machine shop business in the State of Washington under the name Ravenna Metal Products Corporation ("Ravenna"). By an Agreement dated July 5, 1947 ("1947 Agreement"), Hiatt granted to

---

1. The abbreviation "App." shall be used herein to designate pages in the Appendix filed with the Court of Appeals, copies of which have been certified to this Court.

Ravenna an exclusive sub-license under the 1945 Agreement (App. 11).

In late 1954 or early 1955, Ravenna's request for a change in zoning to permit plant expansion was denied and Hiatt advised his personnel that the existing plant would have to be moved. Haitt instructed one of his employees to try to locate a new plant site; one of the areas suggested was Elyria, Ohio. Other employees were requested to prepare a lay-out of the proposed new plant (App. 34).

During this period of time, Hiatt was trying to locate an organization which might be interested in purchasing a controlling interest in, or otherwise acquiring, Ravenna. In furtherance of this objective, he contacted various concerns which had advertised in the Wall Street Journal expressing a desire to purchase a going business and also contacted large manufacturing concerns in the hope of promoting a sale or merger (App. 51-52).

Stanadyne, Inc.[2] ("Stanadyne"), respondent, learned from one of its customers, who knew of its need for a product line at its Elyria, Ohio plant and was also a supplier to Ravenna, that Ravenna was interested in relocating its faucet business (App. 34-35). During the summer of 1955, Hiatt met with representatives of Stanadyne who expressed to Hiatt an interest in purchasing Ravenna and moving the faucet production to Elyria, Ohio. Thereafter,

---

2. Stanadyne is a Delaware corporation and the corporate successor to Standard Screw Company, a New Jersey corporation, and for purposes of continuity, "Stanadyne" shall be used herein to designate the respondent as well as its corporate predecessor. Chicago Screw Company (Chicago, Illinois), Hartford Machine Screw Company (Elyria, Ohio) were wholly-owned subsidiaries of Standard Screw Company. Stanadyne presently has manufacturing facilities in Hartford, Connecticut, Chicago, Illinois, Gary, Indiana and Elyria, Ohio; however, faucet production has always been carried out exclusively at the Elyria, Ohio plant.

Hiatt toured the Elyria, Ohio plant to determine if it was equipped to manufacture the faucet product line (App. 53-54, 57-58). At a meeting of Ravenna's Board of Directors on September 27, 1955, Hiatt reported that if the Stanadyne deal was consummated all faucets would be made at the Elyria, Ohio plant which was in need of work; it would also be the new location of the faucet sales department (App. 58-59). In the fall of 1955, Hiatt advised certain Ravenna personnel of the proposed sale to Stanadyne and the transfer of all faucet production to Elyria, Ohio. He further indicated that certain employees would be afforded an opportunity to move to Elyria, Ohio and thereby remain with the faucet operation. By late 1955, Ravenna employees were deciding which tools, equipment and parts would have to be moved from Seattle, Washington to Elyria, Ohio in order to manufacture the faucets at the new location (App. 35, 37).

Negotiations between the parties resulted in an Agreement, effective January 9, 1956, whereby Stanadyne acquired all of the issued and outstanding stock of Ravenna. At all times prior to the acquisition Hiatt was the majority stockholder and president of Ravenna (App. 11, 34, 37, 45-47). Since Stanadyne needed work for its Elyria plant, the Ohio situs of all future faucet production was a definite if unwritten condition precedent to Stanadyne's agreement to purchase Ravenna (App. 34, 38, 58-59). In June 1956, pursuant to a Plan of Liquidation and Dissolution, Stanadyne acquired all of the assets of Ravenna, including the 1947 Agreement (App. 11-12, 45-47). During the interim period, Ravenna employees, together with tools, equipment and parts moved to Elyria (App. 35, 37-38). Moen was one of the Ravenna employees who moved to Elyria, Ohio in 1956 (App. 38). All single handle, core-type faucets have been manufactured exclusively in Elyria,

Ohio from about April 1956 to date and Stanadyne has never manufactured any type of faucet in the State of Washington (App. 39-40).

After the acquisition in 1956, Hiatt was made a vice president of Stanadyne and placed in charge of the Ravenna Metal Products Division in Seattle, which manufactured non-faucet products. He remained in this position during the move to Elyria, Ohio. Hiatt resigned as vice president on June 25, 1958 (App. 40).

In the summer of 1956 and subsequent to the commencement of faucet production in Elyria, Ohio, Stanadyne, Hiatt and Moen entered into negotiations concerning Stanadyne's rights under the Moen core faucet invention. These negotiations culminated in an agreement dated June 27, 1957 ("1957 Agreement"), about which this controversy centers, whereby the 1945 and 1947 Agreements were cancelled and Moen granted to Stanadyne an exclusive license under the Moen core faucet invention subject to the payment of royalties by Stanadyne to Moen and Hiatt. Amendments to the 1957 Agreement were made by the parties thereto on August 11, 1961 and December 31, 1970 (App. 16-32, 40).

Since its commencement in 1956 of core-type faucet production in Elyria, Ohio, Stanadyne has paid royalties to Hiatt in excess of $1,000,000 based upon the Elyria manufacture and sale of faucets—these payments having been made not only on the "Core" type faucets but on two later developed faucets—the "Cartridge" and the "H-C" as well (App. 4). All faucet production records and royalty payment calculations are maintained and made at Elyria, Ohio. All royalty checks and reports have been mailed to Hiatt from Elyria, Ohio and all royalty checks through the first quarter of 1969 were drawn on the National City

Bank of Cleveland, Ohio (App. 42). On several occasions Hiatt or his counsel have written letters to Stanadyne in Elyria, Ohio with respect to questions arising under the 1957 Agreement or amendments thereto and all responses by Stanadyne have been prepared in and sent from Elyria, Ohio (App. 41).

In the spring of 1971, Stanadyne discovered that it had mistakenly paid royalties on the manufacture and sale of the "Cartridge" and "H-C" type faucets, which did not come within the scope of the Moen core faucet inventions and consequently were not covered by the 1957 Agreement. On June 22, 1971, Stanadyne advised Hiatt that it had mistakenly paid him royalties which he was not entitled to receive under the 1957 Agreement and that it would henceforth only pay royalties on the "Core" type faucet inventions. Hiatt rejected Stanadyne's position, insisted that royalty payments be made on all types of single handle faucets embodying Moen inventions and threatened litigation to compel such payment (App. 4-6).

Stanadyne commenced the present action in the United States District Court for the Northern District of Ohio, Eastern Division, to resolve the controversy between itself and Hiatt by obtaining a declaration of its rights and obligations under the 1957 Agreement and the restitution of funds mistakenly paid. Hiatt, a citizen and resident of the State of Washington, was served in Washington by certified mail pursuant to Rules 4(d)(7) and 4(e) of the Federal Rules of Civil Procedure and Rule 4.3 of the Ohio Rules of Civil Procedure. Thereafter, Hiatt filed a Motion to Dismiss and to Quash Service of Process ("Motion") on the ground that personal jurisdiction could not lawfully be obtained over him in Ohio. No question has been raised as to the form of process or method of service; the only issue raised is whether as a matter of constitu-

tional law district court has power to exercise jurisdiction over Hiatt.

On December 6, 1971, the District Court entered an Order granting the Motion and dismissing the Complaint with respect to Hiatt for lack of personal jurisdiction (Appendix to Petition, pp. 8-9). The only findings made by the District Court in granting the Motion are those set forth in its Order, which findings are reproduced below in their entirety for the Court's convenience:

> "1. That the defendant Hiatt has not purposefully availed himself of acting in the State of Ohio or causing a consequence in the State of Ohio.
>
> 2. That the case of *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968) is distinguishable from the facts in the present case.
>
> 3. That the defendant Hiatt has not transacted business in the State of Ohio as provided for in Ohio Civil Rule 4.3(A)(1)."

On October 26, 1972, the Sixth Circuit Court of Appeals reversed and remanded the case for further proceedings (Appendix to Petition p. 10)

ARGUMENT

I.

The Petition Does Not Present an Important Federal Question or a Conflict in Decisions, but Turns on Narrow Factual Considerations Limited to the Present Case

The issue in the present case turns upon a specific fact situation which is unique to the parties alone, and no amount of strained semantics can convert it into one warranting review by this Court. There is no important question of Federal constitutional law which requires a decision by this Court. Nor is there any conflict of decisions which compels review by this Court. All that is involved are the numerous contacts which petitioner had with the State of Ohio and the Court of Appeals' conclusion that such contacts subjected petitioner to personal jurisdiction in the Northern District of Ohio under Ohio's Long-Arm Statute.

The existence of personal jurisdiction over a nonresident under a state's long-arm statute "must obviously be worked out with reference to the facts of a particular case rather than in a statement of dogmatic rules of all-inclusive principles". *Velandra v. Regie Nationale Des Usines Renault*, 336 F.2d 292, 295 (6th Cir. 1964). This Court has repeatedly held that it will not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Accord *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938); *N.L.R.B. v. Waterman Steamship Corp.*, 309 U.S. 206, 208 (1940). Yet that is the precise function which petitioner now asks the Court to perform. This case does not present the type of situation which

necessitates consideration by this Court. Any review would necessarily relate only to the limited factual situation presented by the Petition and would not enlarge on any federal question of substance that has not already been decided by this Court. Therefore, respondent respectively submits that the petition should be denied.

II.

The Decision Below Is Manifestly Correct

In a trilogy of opinions—*International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) and *Hanson v. Denckla*, 357 U.S. 235 (1958)—this Court laid down the due process standard to be applied by the states in obtaining personal jurisdiction over a nonresident defendant. In *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968) (Appendix to Petition, pp. 11-31), the Sixth Circuit Court of Appeals had occasion to review in depth these opinions, and concluded that the following three criteria emerged therefrom and must be found to exist in each case where personal jurisdiction is imposed on a nonresident defendant:

(1) "the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state";

(2) "the cause of action must arise from the defendant's activities there"; and

(3) "the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the

exercise of jurisdiction over the defendant reasonable." (401 F.2d at 381—footnote omitted).

The Court of Appeals applied these criteria to the operative facts of the present controversy and properly concluded that consistent with due process, personal jurisdiction could be and had been obtained over petitioner in Ohio.

Petitioner does not contend that these criteria are in conflict with the due process standard established by this Court. Instead, in his first argument, petitioner seeks review on the theory that these criteria are "impossible to understand and apply at the trial court level" (Petition, p. 9). Such an argument certainly does not rise to the level required for review by this Court. Furthermore, petitioner's theory in this respect is erroneous. Although, as pointed out by petitioner (Petition, p. 11) the Sixth Circuit has had, since the *Southern Machine* case, occasion to reverse district courts on the question of extra-territorial jurisdiction, it should be noted that the Sixth Circuit has also sustained district court rulings on this subject. See *Kroger Co. v. Dornbos*, 408 F.2d 813 (6th Cir. 1969); *Nationwide Motorist Assoc. of Mich. v. Freeman*, 405 F.2d 699 (6th Cir. 1969); *Tate v. Renault Inc.*, 402 F.2d 795 (6th Cir. 1968). Even if there were anything to petitioner's theory that the Sixth Circuit's guidelines are confusing to district courts, in the present case the criteria were applied by the Court of Appeals which enunciated them—not a trial court—and therefore what the district court may or may not have understood is of no consequence. Certiorari should not be granted on the basis of such a meritless argument.

Petitioner's second argument that the Sixth Circuit failed to follow the teachings of *Hanson v. Denckla, supra,* is totally unsupported by the record. To contend that this

case involves only the "unilateral activity" of respondent is factually erroneous. As more particularly set forth in the Statement of the Case, petitioner engaged in numerous activities which directly involved the State of Ohio. The Sixth Circuit was fully cognizant of this Court's admonition in the *Hanson* case and properly applied its mandate to the facts of the present action.

Petitioner's third argument borders on the unbelievable. To contend that a decision based entirely on and limited to a specific fact situation "will encourage and foster the widespread use of commercial blackmail between parties to business contracts" (Petition, p. 9) is unrealistic, and totally without legal support. It can hardly be suggested that petitioner is being "blackmailed" because after receiving over one million dollars in royalties and hoping to extract additional vast sums from Ohio he is called upon to defend an action in the sole jurisdiction from which the royalty payments emanate, and is intimately tied to events which he set in motion.

Petitioner's three arguments fail to remotely approach the minimum level of importance and consequence required to warrant review by this Court.

CONCLUSION

This Court has established the due process standard which must be met by the lower courts in applying state long-arm statutes before personal jurisdiction may be obtained over a nonresident defendant. Consideration by this Court of a particular finding pursuant to a given long-arm statute involves a factual consideration which is limited to a specific action and will not ultimately be of broad applicability. The due process standard was properly applied by the Sixth Circuit and for this reason, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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